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Marriage and Divorce

by

Cecil Chapman

London
David Nutt, 57-59 Long Acre
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SOME NEEDED REFORMS IN CHURCH AND STATE

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METROPOLITAN MAGISTRATE

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PREFACE

My object in writing this book is to submit the institution of marriage to criticism based upon daily experience, in order that such evils connected with it, as are purely artificial, may be fully considered by the public at large with a view to their removal or modification. I have endeavoured to emphasise the fact that, however sacred its character, marriage is a civil contract, and to show that as such it cannot be maintained at a high level of excellence without the liberty to break it when its purpose has been ignored or rendered impossible of fulfilment. I hope also to have shown that divorce is not an evil in itself, but an index of evils

which it is calculated to remove; that the increased tendency to seek divorce is not primarily due to the growth of immorality, but rather to a living aspiration after a higher standard both of morality and happiness in marriage. Increased facility for divorce is a means of promoting regard for marriage obligations, but it leaves the injured party entirely free to accept or reject it, having regard to the interests of the children and general morality. Some readers may be offended by the fault which I find with ecclesiastical tradition, and many will remain unaffected by my arguments, but I hope that none will misunderstand my aim.

CECIL CHAPMAN.

24 BUCKINGHAM GATE, S.W.
January, 1911.

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MARRIAGE AND DIVORCE

CHAPTER I

MARRIAGE

'The physical passion which I feel is nothing in comparison with the worship I feel for the soul, the mind, the heart, all in that woman which is not mere woman; the enchanting divinities in the train of love with whom we pass our life, and who form the daily poem of a fugitive delight.'—BALZAC, *Honorine*.

THE appointment of a Royal Commission to consider the whole question of Divorce is an index of widespread feeling in the nation that the laws regulating the institution of marriage are not properly adjusted to the present instincts and conscience of the people. The family is the unit of the State,

and marriage is the institution or social product intended to secure and preserve the welfare and happiness of the family. If, broadly speaking, there is found to be in family life much unhappiness and much that is harmful for the physical and moral welfare of the future generation, it is necessary to consider how far these evils are due to preventable causes, and especially to what extent they are due to the artificial and legal regulations which have been framed for its growth and continuance.

In order to arrive at a clear understanding of the problem it is necessary to have some acquaintance with the history of marriage. In religion or politics or any other human sphere we must know the past if we would use the present or provide for the future. We must know how men lived and thought, not only how they professed to live and think. There is no subject upon which people are

inclined to speak with more conventionality and less regard to actual facts and historical truth than that of marriage. It is sufficient for many good people to consider the subject of marriage as the Jews were taught to regard the ark of the Covenant. In their opinion it is too sacred to be touched by discussion ; but as has been well said, 'Those in our day who talk so much about the sacredness of marriage can know but little of its history.' At any rate, it is a subject with which from all time men have not only felt themselves competent to deal, but have actually dealt with according to their needs.

Ideally, marriage is a divine institution, freely entered into by a man and woman as a matter of mutual consent for life, dependent for its continuance upon nothing but will and affection. Historically, it is nothing of the kind. It is the product of social

evolution and has been the subject of change and growth controlled by cosmic or universal laws exactly in the same way as political and all other human institutions have been. It is not a discovery but a growth from the necessities of human nature. It has in consequence taken every variety of form, from simple concubinage terminable at will to polyandry the marriage of one woman with many men, polygamy the marriage of one man with many women, and monogamy the marriage of one man with one woman. No collection of human beings has been discovered without some attempt to regulate and restrict the sexual intercourse of men and women for the establishment and maintenance of families, and the strictness of these regulations has appeared to increase with the growth of culture and civilisation. It is an interesting and happy discovery that there has been and still is a

general tendency throughout the world towards the monogamous form of marriage as best suited for human happiness. The author of the first chapter of Genesis has put on record the ideal or divine form of marriage, and man has from the beginning of history been, blindly and half unconsciously but slowly and surely, struggling to arrive at it.

In a work dealing with everyday problems it would be out of place to dwell with any detail upon the thousand different ways in which the process of ages has revealed itself, but we shall not realise how far we are, as a nation, from the ideal set before us, nor where we are to seek for the right way to the goal, unless we understand clearly the exact nature of our own Marriage Institution, the road by which we have travelled to it, and the extent to which it has proved itself unsuited to a complete fulfilment of its purpose.

It is important at the outset to bear in mind the distinction between the legal and ecclesiastical view of marriage which necessarily react the one upon the other. The institution of marriage was, of course, established in England, first by custom and then by law, long before the Church had anything to do with it, and our law has always considered and still considers marriage in no other light than as a civil contract (Blackstone, chap. xv). It was a human and purely civil institution which grew up and became gradually legalised by the community. It may have passed through several different forms before reaching that of monogamy ; according to Caesar there was fraternal polyandry among the ancient Britons ; and it must certainly have been attuned to the several stages of communal or national development, namely, the hunting, the nomadic, the pastoral, and the

industrial. It began with marriage by capture, and passing to marriage by purchase arrived at a very imperfect form of marriage by contract on terms of mutual consent. The duration of marriage gradually increased with the growth of culture, and it is proved beyond doubt that a certain amount of civilisation is an essential condition for the formation of life-long unions. The only marriage known to the law of England is Christian marriage, which has been judicially defined as 'the voluntary union for life of one man and one woman to the exclusion of all others' (*Hyde* v. *Hyde*, L. R. 1 P. & D. 130). Polygamous marriage is common enough in practice and openly advocated by all who maintain the dual standard of morals, and traces of several of the ancient forms are still discoverable in the daily customs of our people as well as in the service of our Church.

The ecclesiastical side of marriage originated in the endeavour to insure fidelity to the contract by some impressive ceremonial. This was the characteristic of all covenants, and marriage from earliest times was regarded not only as a covenant between the parties but also as an alliance between their families and relations, and as such was a matter of high importance. The ceremonies differed in every age and country, but their object was always the same, namely, to give solemnity and publicity to a bargain which was intended to be lasting. This idea of publicity was also the excuse for wedding feasts, which have been the practice of every country, and in Babylon were carried to so extravagant a length that sumptuary laws were passed to control them. When the custom was observed of purchasing a wife for a stipulated price and a few presents made to the bride herself, the event was marked by

a feast to show that the wife was considered a valuable acquisition, for she was not only looked upon as a wife, but also as a servant or slave. In Assyria it is said that all marriageable girls were put up for sale by auction every year, and according to their attractions were sold with or without dowry. It is further stated that in Assyria there was a Court or Tribunal whose only business it was to dispose of young women in marriage, and see that the laws of their union were properly executed ('History of Women,' by William Alexander, M.D., 1779). The Romans, from whom we derive most of our ceremonial customs, had three forms of marriage, known as *confarreatio*, *coemptio*, and *usus*. The first was the most solemn and religious in character. It involved the wife's passing into the 'hand' or power of her husband, and was conducted by the high priests. The second was a civil

ceremony representing a purchase, which also involved the acquisition by the husband of *manus* or power over his wife. The third involved no such subjection of the woman, but was dependent on nothing but mutual consent for its continuance until regulated by law. Speaking generally, the institution of marriage in all nations was attributed to the first law-givers, except amongst the Jews who, living under a theocracy, attributed it to God Himself. The ceremony, however, amongst the Jews does not appear to have been conducted by their priests or prophets, but was left to be dealt with by their magistrates and the relations of the parties, and the strong presumption is that it was not considered in any other light than as a civil compact. This is the view taken of it by Buddhists and Mohammedans, though with them, as with other nations, the blessing of God is

invoked upon the married pair by a lama or priest. The idea of marriage being a religious contract which could only be performed by a priest is peculiar to the Christian Church, and was not developed until several centuries after the Christian era. The stages by which marriage in Christian countries gradually came under ecclesiastical jurisdiction are described by Professor Howard, in his 'History of Matrimonial Institutions,' as follows :—

'(1) It seems probable that during the first three or four centuries Christian marriages were not celebrated in church. The betrothal or nuptial benediction was not essential to a valid marriage, however important from a religious point of view. After the nuptials, the married pair attended the ordinary service and partook of the Sacrament.

'(2) The introduction of the bride mass constitutes the second stage in the history

of clerical marriage. Apparently the function of the priest is purely religious. It is merely an invocation of the Divine blessing upon the life of the newly wedded pair, and has no legal significance.

'(3) In the tenth century we reach the beginning of a third stage in the use of the ecclesiastical ceremony. The nuptials still constitute two distinct acts. The first is the "gifta" proper according to the usual temporal form. It is no longer a strictly private transaction, but it takes place before the church door—*ante osteum ecclesiae*—in the presence of the priest who participates in the ceremony and closes it with his blessing. The second act consists in the entrance into the church and the celebration of the bride mass, followed by a second benediction.

'(4) The next step was accomplished in the beginning of the thirteenth century. Marriage was usually celebrated by the

priest, and not merely in his presence; though the ceremony still takes place at the church door. Not until the thirteenth century, as a general rule, does the priest appear with authority as one specially qualified by his religious office to solemnise the nuptials.

'(5) The final stage in the process of ecclesiastical domination, in which the Canon Law supplanted and eliminated the secular jurisdiction, was reached with the complete development of the Sacramental dogma.'

This had become a recognised dogma of the Church in the middle of the twelfth century, and in 1164 was incorporated in the list of the Seven Sacraments of the Church in the sentences of Peter Lombard. It was re-affirmed in 1439, and, finally, in 1563 it was again re-affirmed by the Council of Trent, and the whole subject placed under ecclesiastical jurisdiction. From that date, in all

Roman Catholic countries, no marriage was valid which was not celebrated in accordance with the rites of the Church, and consecrated by one of her ministers, and so it remained for all practical purposes in England until the year 1857, in spite of many efforts to the contrary.

The above statement is not strictly accurate of the Roman Catholic Church, for marriage by simple consent of the parties even without witnesses has until quite recently been always recognised by that Church as valid although not associated with divine grace. Within the last few years a Roman Catholic so married was bound to get the marriage annulled by ecclesiastical authority in order to remarry, and the validity of such a marriage was only decreed to be impossible by the present Pope some two years ago. This marriage by simple consent has always been recognised in Scotland if the consent has been *bonâ fide* expressed in the presence of witnesses.

Resistance to the sacramental theory of marriage accompanied the resistance to ecclesiastical dominion which characterised the Protestant Reformation. As Professor James Lichtenberger says in his 'Divorce, a Study in Social Causation':

'Luther's conception of women and marriage is determinative for Protestant thought. He considered marriage pure and the normal relation of the sexes. Natural impulses, he held, were divinely implanted, and the legitimate function a social duty. He denies that marriage and the Church have anything in common. "Marriage is to be regarded as an act of free will by those who participate in it. It does not concern the Church. Therefore know that marriage is an external thing as any other worldly transaction."'

Selden said: 'Marriage is nothing but a civil contract. 'Tis true 'tis an ordinance

of God—so is every contract. God commands me to keep it when I have made it.'

The sacramental idea gradually disappeared in Protestant countries, but so strong was the feeling in England that marriage was a divine institution owing to the matrimonial jurisdiction of the Church, that sacerdotal nuptials remained as indispensable as ever, and no definite progress was made in the direction of civil marriage until what has been called Cromwell's triumph: 'The Civil Marriage Act of 1653,' which is summarised by Professor Lichtenberger as follows:—

'From this event may be dated the modern era of civil contract marriage. By it—

'1. The sphere of matrimonial jurisdiction was defined.

'2. Conditions of marriage and the form of ceremony were established.

'3. The machinery of administration was determined.

'Jurisdiction was vested in civil tribunals, and a civil ceremony was required in all cases of valid marriage. The ceremony established the doctrine of mutual consent, and was performed by a justice of the peace after due publication of banns. The wording of the ceremony, however, was of a religious character. The whole subject of administration as regards controversies, lawfulness and unlawfulness was placed in the hands of justices of the peace and local judges. This Act, providing as it did for jurisdiction, registration, publication, and every civil function in reference to marriage, has been the model for legislation in all civilised countries for two centuries and a half.'

While this Civil Marriage Act was not repealed, it was rendered inoperative almost at once by the political changes that occurred,

and was not revived for exactly a century. The Hardwicke Act of 1758 imperfectly re-established civil marriages, and its defects were remedied by the Act of 1833, which with the Act of 1856 constitutes the present civil marriage law of England.

'In the United States from Colonial days the civil contract idea of marriage has prevailed. The nineteenth century has witnessed the establishment of the civil contract idea of marriage throughout practically the whole civilised world.'

The effect of this change of ideas or doctrine of marriage will be dealt with in a subsequent chapter upon divorce, but the necessity for the change will be at once appreciated when it is remembered that for persons who belonged to any religious body other than the Anglican Church there could be no lawful marriage in England without the Anglican ceremony, until in the

reign of George IV (4 Geo. IV, c. 76, s. 31) exemption was made for Quakers and Jews, and in the reign of William IV (6 & 7 Will. IV, c. 85) marriages were authorised in registered buildings and before a registrar.[1]

How far the Protestant idea is embodied in the Anglican service, known as 'The Solemnisation of Matrimony,' and how far it insists upon the pre-Reformation sacramental idea, is a matter of profound interest, but is not strictly relevant to my inquiry. What I desire to examine is the extent to which it conforms to the divine ideal of marriage referred to at the beginning of this chapter, and in what respects it jars with modern ideas of equity, and tends to lower rather than raise the moral conception

[1] The following figures show the gradual nature of the change which has taken place: From 1851 to 1855 the proportion of marriages solemnised according to the rites of the Established Church was 842 per thousand marriages, whereas in 1908 it had fallen to 616 per thousand.

of marriage, and perpetuate rather than check or modify much that is regrettable in the attitude of mind commonly adopted by married persons.

It must be remembered that although the Church made marriage a sacrament, and thereby made it impossible for laymen to celebrate it, the early teaching that marriage was a necessary evil was never abandoned, and still finds a place in the Church service. St. Jerome said: 'Marriage is always a vice: all we can do is to excuse and cleanse it.' And again: 'The end of matrimony is eternal death; the earth is indeed filled by it, but Heaven by virginity.'

Jovinian is reported to have been banished in the fourth century by the Emperor Honorius for maintaining that a man who had cohabited with his wife might be saved, provided he observed the laws of piety and virtue laid down by the Gospel.

As a logical outcome of this teaching celibacy was eventually, after many centuries of resistance, made compulsory for the clergy. Resistance to the ordinance was particularly strong in England, but was finally overcome by a decree depriving the wives and children of the clergy of any benefit from the husband's estate. After this they seem to have quietly submitted to the yoke until the Reformation restored to them again the rights of mankind.

In the reign of Edward VI an Act was passed by which the marriages of clergy were declared lawful and their children legitimate. Such a marriage had been made a felony in the reign of Henry VIII. In the reign of Queen Mary the Act of Edward VI was repealed, and so things remained until the first year of James I, when an Act was passed restoring the rights

of nature to the clergy, and that Act is still in force.

The Anglican service gives countenance to this depreciatory or ascetic view of matrimony in the following words :—

'Secondly it was ordained for a remedy against Sin and to avoid fornication ; that such persons as have not the gift of continency might marry and keep themselves undefiled members of Christ's body.'

It seems little short of blasphemy to speak of the natural impulses of human nature as evil in themselves, and it is certainly degrading to the conception of matrimony to speak of it as a remedy for sin. The early Christian ideal of celibacy and virginity, which is hereby indicated, not only reflects depreciatingly upon the universal ideas of innocent happiness, but, as a maxim for general adoption, is inconsistent with the continuance of any national life.

The importance of the matter lies in its detrimental effect upon moral ideas which cannot be exaggerated.

Of even greater importance in its effect upon national life is the Church's teaching of sex inequality, which is quite inconsistent with the ideal of marriage based upon mutual attraction and choice, and safeguarded by reciprocal rights and privileges.

This appears in the following passages from the Church service :—

(i.) The woman is asked whether she will ' obey and serve ' her husband—whereas the man is only asked whether he will ' love and comfort his wife.'

(ii.) The woman is ' given away ' by father or friend to be married to the man, instead of giving herself freely to him in return for his giving himself freely to her.

(iii.) The man only says, ' With this ring

I thee wed,' instead of, as in most other countries, the man giving a ring to his wife in exchange for a ring which she gives to him.

(iv.) The prayer for a blessing upon the newly married pair runs as follows: 'O God who by Thy mighty power hast made all things of nothing; who also (after other things set in order) didst appoint that out of man (created after Thine own image and similitude) woman should take her beginning, and knitting them together, didst teach that it should never be lawful to put asunder those whom Thou by matrimony hast made one—look mercifully upon these Thy servants that both this man may love his wife according to Thy word, and also that this woman may be loving and amiable, faithful and obedient to her husband.'

This view of woman's subservience to

man is wholly inconsistent with the ideal of marriage with which we started, and wholly contrary to the teaching of the first chapter of Genesis, where 'God said: "Let us make man in our image, after our likeness, and let *them* have dominion over the fish of the sea," &c. So God created man in his own image, in the image of God created he him; male and female created he *them*. And God blessed them and said unto them, "Be fruitful and multiply—and have dominion,"' &c.

As if woman was not created in God's image in the same way as man, and as if the Jehovist second chapter of Genesis, which presumably was written to justify the then established subjection of women, had the impress of divine truth and the authority of history rather than the Elohist first chapter. Whatever value may now be given to it, the story of the second chapter

does not appear to have had much credit with the Jews, as it is never referred to in the Prophets or Psalms, or Historical works, nor indeed in the New Testament, until St. Paul found in it a justification for his teaching in almost exactly the same way as the authors of the Church service have done. It is essentially unspiritual and altogether lower in standard than the first chapter, but the mischief of it does not end there. It is made the justification for a different standard of obligation in regard to fidelity which is repudiated by modern opinion.

Similar fault must be found with the common interpretation of the phrase ' Whom Thou by matrimony hast made one,' because in the final discourse St. Paul's words to the Ephesians are read : ' For we are members of His body, of His flesh and of His bones. For this cause shall a man leave his father and mother and shall be joined unto his wife ; and

they two shall be one flesh. This is a great mystery, but I speak concerning Christ and the Church.' And again: 'Wives, submit yourselves unto your own husbands as unto the Lord. For the husband is the head of the wife even as Christ is the head of the Church; and He is the Saviour of the body'—'therefore, as the Church is subject unto Christ, so let the wives be to their own husbands in everything.'

Upon this passage Milton makes the pertinent remark that 'if the husband must be as Christ to the wife then must the wife be as the Church to her husband. If there be a perpetual contrariety of mind in the Church towards Christ, Christ Himself threatens to divorce such a spouse and has often done it.'

The spiritual unity of two persons united by mutual affection is a noble conception, and an ideal never to be lost sight of, but a

mysterious notion of physical unity which involves the submission of the woman to her husband in everything, and the actual loss of her personality in his is an ignoble conception, and one which has led by its reaction upon the law to many absurd conclusions and ever recurring injustice. It is due to this very material interpretation of oneness that wives for so many centuries were deprived of education, and deemed incapable of owning property, or being guardians of their children, or of enjoying any of the rights and privileges of a separate personality. A married woman could not make a contract, or bring an action on her own account, or even be liable for her own wrong-doing. Selden says: ''Tis reason a man that will have a wife should be at the charge of her Trinkets and pay all the scores she puts upon him. He that will keep a monkey, 'tis

fit he should pay for the glasses he breaks.' She was liable to physical correction by her husband, and for all practical purposes was ignored by the law; she lost her name and her domicile,[1] and under the doctrine of coverture was presumed in criminal law, except in case of murder and high treason, to have always acted under the influence of her husband. Husbands and wives cannot be guilty of conspiracy, because a man cannot conspire with himself. Husbands and wives, except in certain special cases, cannot give evidence against each other. It is true that since the Married Women's Property Act, 1884, great changes for the better have taken place, and in America it is boasted that the law has now reached that elevation of ethical

[1] An Englishwoman married to a foreigner living in this country who has not been naturalised is a foreigner, although she has never left her own country, and as such is not entitled as a widow to an old-age pension.

sentiment which enables it to announce that Justice knows no distinction of sex. That is far from being the case in England, and it is to a very large extent due to this false and ignoble conception of unity.

The idea of a man leaving his father and mother and clinging to his wife is thought by some to have come from the Bena form of marriage which was customary among the Arabs, under which a man left his own relations to live in his wife's tent. The practice of a man living happily with his wife's relations, whatever it may be in other countries, is very rare in England, and amongst the poor the 'mother-in-law' is constantly referred to as 'the source of all the trouble.' The truth is that, owing to our barbarous customs and bad laws, the wife's mother is a necessary and frequently the only protection which a wife has got from starvation and violence. This is not

sufficiently realised by unthinking people, who generally agree with Montaigne's saying, that 'It is not everybody who is born lucky like the man who, shooting at a hare, killed his mother-in-law.'

I would make one further criticism of the service, in that portion of it where the husband is made to say 'With all my worldly goods I thee endow.' The phrase is intended to represent benevolent lordship in the husband, but it has no reality whatever in practice. In the vast majority of marriages there are no worldly goods on either side, and in the minority it often happens that the husband has no worldly goods of his own, but is receiving a large endowment from a rich wife. The pecuniary dependence of wives is a frequent cause of disaster in marriage, but such an expression is worse than no remedy—it is a mockery. The vain repetition of fine sentiments is said to be one of the

devil's favourite methods of preventing right action, and the Church is seriously injured by association with it.

I spoke of pagan and worldly customs being traceable in our marriage service, and there is no doubt that 'the giving away of a wife' to her husband represents the old marriage by purchase, and 'the ring' probably represents the gold given for her, although it is by some supposed to represent the passing through the ring as a sign of submission. 'The best man' represents the marriage by capture, as the friend who was the best man for the work. 'The throwing of slippers' is supposed to represent the pelting of the man who has captured the bride, or the giving to him the shoe as a token of dominion.

The meaning of these things is of no practical importance, except in so far as they signify the possessory idea of marriage, and

the essentially inferior and even chattel-like position assigned to woman. It is, however, important to realise how completely the Christian Church has adopted and blessed the Pagan ideas without realising their moral significance. The world is moving towards individual liberty and sex equality in moral obligation, and without doubt the Church is moving in the same direction; but from a natural reluctance to modify its institutions, it has been prevented from realising how responsible it is for the spreading and maintenance of false ideas which are productive of great evil. The pity of it is that instead of qualifying the idea of woman being treated as a 'possession,' and raising the conception of marriage to a spiritual level, the Church has expressly dwelt upon the material side of marriage, and definitely encouraged the notion of a woman being handed over to her husband

to be kept lovingly in a condition of complete subordination for life.

Among the Society of Friends the service is conducted without the intervention of a clergyman or other official, the pair standing hand in hand in the midst of the crowded congregation, while the bridegroom declares as follows: 'Friends, in the fear of the Lord and in the presence of this assembly, I take this my Friend . . . to be my wife, promising, through Divine assistance, to be unto her a loving and faithful husband until it should please the Lord by death to separate us.' In equally clear, unfaltering accents the bride is expected to make a similar declaration. Prayer and hymns follow, and the ceremony ends with the public signing of the register.

By the Marriage and Registration Act, 1856, s. 12, no marriage is to be solemnised at a registry office with any religious service, but each party may subsequently be married

in church or chapel if the minister thinks fit.

At this ceremony each of the contracting parties shall say to the other:

'I call upon these persons here present to witness that I A. B. do take thee C. D. to be my lawful wedded husband or wife.'

Or simply:

'I A. B. do take thee C. D. to be my wedded husband or wife.'

This ceremony is exceedingly curt and leaves much room for improvement, but it has these merits:

(i.) It is based upon the doctrine of mutual consent by two equally responsible individuals;

(ii.) It states nothing which is contrary to what is generally accepted as historically true;

(iii.) It puts upon the contracting parties nothing which they cannot be reasonably expected to perform; and

(iv.) It assumes to know nothing of the religious feelings of the parties, and leaves the sense of obligation to the individual conscience.

The insistence upon civil marriage for everybody would give increased importance to the ecclesiastical ceremony and enable the Church to surround the privilege with reasonable conditions as to age, parental consent, health, character, and means, which, as the law now stands, it is powerless to control. This powerlessness of the Church is glaringly exhibited when there is, as sometimes happens, competition for marriages. In such cases fees are often unwisely reduced or waived altogether, and on favourite days, such as Christmas or Easter Day, the solemnisation ceremony is performed for a large number of couples at once. I have been told on good authority of one case where, on the marshalling of the crowd, two friends found themselves standing respectively by the bride-

elect of the other. Without changing places they went through the whole ceremony and only revealed the fact when signing the register. The clergyman informed them that he could not perform the ceremony over again nor could he unmarry them and it would be necessary to take legal advice on the matter. The couples retired, but in a short time they returned and said that they would not trouble him, they had talked the matter over and thought they could get on very well as they were.

I have dwelt upon this matter at length because I am convinced that in bad marriage laws and customs are to be found the chief causes of divorce, and my experience—the details of which I have reserved for an appendix—has led me to believe that the violence which husbands are so commonly guilty of to their wives, and the incontinence which is practised in marriage to the

destruction of the wife's body and soul, is due to the possessory idea of marriage, and the idea of man's domination entitling him to the privileges of a master dealing with a servant, as it used to be in the old days, when the rights of persons in a subordinate position were scarcely considered.

The old right of correction, for example, which was allowed by Common Law as well as the Canon Law, began to be doubted as early as the reign of Charles II, but, as Blackstone says, 'the lower rank of people who were always fond of the Common Law still claim and exert their privilege, and the Courts of law will still permit a husband to restrain a wife of her liberty in cases of gross misbehaviour.' Although the law no longer recognises the right of correction it must be borne in mind that bad customs survive for many years the bad laws which gave them birth.

Let it be remembered in this connexion that I do not refer to persons who keep servants, or to wives who have separate estate and can occasionally enjoy the luxury of a solicitor; I speak of the working and poorer classes, whose wives are their own servants, and live in economic dependence, in the closest possible quarters, within reach of every sound, and have no means of escaping from the company of husband or children or of cultivating their individual tastes in any sort of privacy. Where is the possibility of happiness for married persons living under these conditions, unless there is a deeply rooted respect and consideration for each other on equal terms, and a real partnership, not only of the weekly earnings but of all that affects the employment of both husband and wife, or bears upon the health, education, and training of the children? The wishes or even ideals of women in good circumstances

can never be a true measure of right or expediency for their less fortunate sisters.

It must be the desire of everybody to increase the sanctity of marriage, but this cannot be done by ignorant phrases, such as 'let women give up their political aspirations and return to the nursery and the kitchen,' reported from the Church Congress, nor can it be done by proclaiming the marriage bond indissoluble. There can be no sanctity nor morality, nor any human happiness worthy of the name in marriage without reasonable liberty to maintain and develop their individuality secured to each partner. Improvement of moral and material conditions is essential to improved and more lasting marriages. Women's political aspirations are a sign of progress towards such improved conditions, and it is of supreme importance that the Church should, in the interest of national morality, give them its blessing.

Conclusions

1. To emphasise the civil compact and to prevent the scandal of the Church being associated with ill-considered mercenary and immoral marriages, all persons should be compelled to go through the civil form of marriage as the only one giving legal validity.

2. The Church service should be so modified that, its spiritual character being predominant, it may be offered as a source of strength and inspiration to those only who sincerely desire it from a belief in its sanctity and are willing to submit to conditions calculated to promote a happy and permanent marriage.

3. The marriageable age of young men should be raised from fourteen to twenty, and that of young women from twelve to eighteen; in Germany the ages are

twenty-one and eighteen respectively; and the age should always be proved by a certificate of birth or its equivalent.

4. The consent of both parents (if living) should be required personally or in writing for both parties up to the age of twenty-one.

5. A certificate of health must be required showing fitness for marriage to the extent, at least, of the absence of any dangerous or contagious disease.

6. Some provision for the maintenance of the wife during marriage should be made by contract or settlement, which should be her separate property in the same way as her earnings now are.

7. To ensure morality in marriage, and proper respect for its conditions, each of the parties must be armed with power of revision or rescission of the contract on equal terms.

8. Testamentary rights should be so re-

stricted that neither parent should be allowed to deprive the other of a fair proportion of their estate after death.

9. The maintenance of a wife and children, made compulsory by law, should be according to the means and position of the father instead of mere subsistence as it is at present.

10. The bastardy laws should be so altered that a man's responsibility for his children should be equal in every respect with that of the woman, and such children should bear his name and be entitled to a reasonable share of his estate.[1] Legitimation of children by marriage of the parents which was permitted by Canon Law should be restored.

[1] One of the first bills introduced in the Storthing in Norway in 1910, after women had obtained the vote, was to repeal the then existing bastardy law, which is as barbarous as our own, and substitute for it the changes which I have indicated.

11. A woman should not lose her domicile by marriage; all distinction of sex should be abolished before the law, and everything should be done to create or maintain the freedom and equality of women in marriage.

APPENDIX TO CHAPTER I

'The toad beneath the harrow knows
Exactly where each tooth-print goes;
The butterfly along the road
Preaches contentment to that toad.'

RUDYARD KIPLING.

THE following are some of my own experiences which must be similar to those of all other English magistrates.

A woman with her eye blackened asks me for a summons against a man whom she hardly knows, and she apologises for troubling me with such a matter; 'but,' she adds, 'he knocked me down as if he had been my husband, and I cannot stand it.' Another asks for protection against her husband, and when I inquire the reason, replies: 'I cannot stand it any longer, the language he uses towards me before the children every night is such as I would not like to repeat to your worship, and when I remonstrate he boxes my ears and

tells me if I don't like his language I can leave him. I have stood this kind of thing for ten years for the sake of the children, but it has been nothing but misery to me.' Or a husband is brought before me for violently assaulting his wife, and when I ask him whether it is true, replies: 'Yes, it's true enough, but she kept nagging me first about money and boots for the children, which she knew well enough I couldn't give her. I am sorry I hurt her, but what else could I do with her?' Another woman complains that her husband has thrashed her with his belt, and on inquiry the husband explains: 'She whacked the child because he called her out of her name, and I told her if she did that I would whack her; and she defied me, so I beat her.' Or a wife takes out a summons for neglect to maintain and says: 'My husband earns good money, but he gives it to me in dribs and drabs just when he thinks he will, and starves me and the children.' And another: 'Please, sir, what can I do with my husband? He comes home when he likes at one, two, and three in the morning, often drunk, and generally the worse for drink; he pulls me out of bed and keeps me awake all night just as he thinks he will, and if I complain says he will knock my head off. I'm downright afraid of him!' Again: a widower, who had come before

me for some difficulty of his having engaged a housekeeper at five shillings a week, married her within a month because, as he said, 'I'm no fool. I lost five shillings a week over her as a housekeeper, but as a wife I don't have to give her anything.' Or again, a woman summonses a person whom she calls her husband. It turns out that they are living in concubinage, so I bind him over, and grant the woman a summons in bastardy for five children, and I make an order of ten shillings a week for the children. He pays it for a month, and the woman finds the arrangement better than being married, but the man insists upon marrying her in order to quash the order.

On October 3, a woman applying for process against her husband said: 'I can stand a black eye from my husband as well as most women, your worship, but I cannot stand this' (showing a long leather strap); 'my husband beat me black and blue with this last night, and I want you to stop it.'

I am not referring to isolated cases, but to constantly repeated experience, and I refrain from detailing many complaints with reference to sexual indulgence, which are not suited to a work for general readers.

The first two reasons for marriage given in the

Prayer Book have been strangely adhered to in all this to the complete extinction of the third: 'The mutual help and comfort that one ought to have of the other, both in prosperity and adversity.' Self-indulgence on the part of the man and self-destructive obedience on the part of the woman are commonly accepted as being in strict accordance with Church teaching.

CHAPTER II

DIVORCE

'We have thought to tie the nuptial knot of our marriage more fast and firm by taking away all means of dissolving it; but the knot of will and affection is so much the more slackened and made loose by how much that constraint is drawn closer: and on the contrary that which kept the marriages at Rome so long in honour and inviolate was the liberty everyone who so desired had to break them.'—MONTAIGNE.

HAVING considered the nature of marriage and realised the almost endless possibilities of any particular union proving disastrous, it will cause no surprise to find that mankind has from the very beginning of history insisted on the power of putting an end to such a union by divorce, so that the history of the one contains the history of the other.

Before the dawn of civilisation, when marriages were unregulated, parties ceased to live together whenever either of them was tired of the bargain, and in the barbarous condition of polyandry—which is said by Caesar to have existed amongst the ancient Britons, and still exists in several parts of the world—women had the power of divorcing any so-called husband at will; otherwise, through all ages this power of divorce has been, with very few exceptions, confined to man alone, and the only question in each country has been how far that power should be unrestricted, and under what conditions it should be exercised, having regard to the wife and family. There has been one great exception to this universal rule, namely, the Roman Catholic Church, which from the tenth century has insisted upon the sacramental doctrine of marriage and its consequent indissolubility. This

exception will be found on examination to be more nominal than real, but it accounts for the rather curious fact that people are to be found who still consider the question an open one in England, and believe that the present Royal Commission might quite as reasonably restrict as enlarge the sphere of divorce. Such people have not studied history very intelligently, because, if they had, they would have learnt that what the pre-Reformation Church maintained in theory it repeatedly broke in practice whenever the interests of Church or State or sufficiently powerful private individuals demanded it. Lecky cites, for example, a case from Coke 'in which a marriage was pronounced null because the husband had stood godfather to the cousin of his wife.' And it will be shown later on that persons living in Roman Catholic countries, who have less scruples or less means, simply

ignore the law, and live in clandestine relations. The Anglican Church is nominally Protestant, and in its national capacity cannot sustain the sacramental doctrine, but many members of the Church, whose sincere piety cannot but command our respect, are still attached to what has been called traditionism or medievalism, and believe that human nature is capable of being and was intended to be controlled by institutions. Human nature cannot, in fact, be coerced by ecclesiastical or any other institutions. Men insist upon examining every institution by the test of the highest good for the individual and society. They feel instinctively that marriage was made for man, not man for marriage. Its moral value must consist for them in the mutual happiness secured to those who enter into it ; and a higher ethical standard has caused many acts of indignity and cruelty within

the marriage relationship to be now resented which it used to be considered an act of piety to condone for the sake of the institution.

At any rate, in spite of much reluctance due to potent conservative forces, the English nation in 1857, in common with all other Protestant nations, adopted the law of divorce, and, in doing so, subscribed to the idea that without it little or no real progress could be made towards a higher standard of morality. We are still far behind other nations in our methods of dealing with divorce, and are still impressed by the pathetic but foolish cry of the institutionalists that, however disastrous, immoral and impossible a marriage may be in fact, the remedy of divorce is worse than the disease. Experience of practical life and the examination of national statistics will, I believe, put an end to this despairing

view of the subject. It will be found that divorce, which seems to some minds too horrible even to discuss, is the result not the cause of the break-up of the family, and that actual righteousness, as distinguished from conventional, is much more likely to be found in legally putting an end to rather than maintaining a bond which has already been destroyed in practice. It is apt to be forgotten that divorce is sought by innocent people as an escape from intolerable misery, and that for the guilty it is in the nature of punishment. Some people seem to think that the granting of facilities will force divorce upon unwilling people. That can never be the case; but for those who seek to raise the standard of morality in daily life the question will be not whether there shall be divorce, but how far it should be extended to both sexes and to every class on equal terms as a means of regeneration,

without diminishing but rather increasing the profound respect which everyone desires to encourage for a marriage based upon and secured by mutual respect and consideration, if not by mutual affection and true communion of spirit.

A short glance at the history of divorce will prove that it has always been considered a subject of regulation by the State as a secular matter, except for the comparatively short period of ecclesiastical jurisdiction in Christian countries. In Babylonia and Assyria, in India, in Judæa, in ancient Rome, in Ireland and Wales, and in the Anglo-Saxon laws the right of divorce was established by law and by custom for what was deemed to be the well-being of the people. It was for the most part granted to men only, but occasionally to women also, and provision of some kind was always made for the innocent wife and children.

In no country and among no people was marriage ever decreed to be indissoluble until it was so declared by the Roman Catholic Church.

In the code of Hammurabi, King of Babylon, 2250 B.C., a husband might put away his wife without stated cause, but divorce was allowed by law on the application of either husband or wife. The liberty of the husband was restrained by pecuniary penalties in some form of dower or provision for the wife and family. By the Indian laws of Manu it was enacted that 'in childhood a woman must be subject to her father, in youth to her husband, when her lord is dead to her sons; a woman must never be independent.' 'A husband may divorce his wife, but she has no redress for her wrongs' (Müller, 'Sacred Books of the East'). By the law of Moses: 'When a man taketh a wife and marrieth her then it shall

be, if she find no favour in his eyes, because he hath found some unseemly thing in her, that he shall write her a bill of divorcement and give it in her hand and send her out of his house. And when she is departed out of his house, she may go and be another man's wife' (Deut. xxiv. 1–2).

In the Roman code of the Twelve Tables, 449–451 B.C., great freedom of divorce was allowed, but it does not appear to have been made much use of. By the Lex Julia, 90 B.C., divorce was permitted to either husband or wife, but it was sought to restrain the use of it by pecuniary penalties. Divorce by mutual consent was always allowed, but a bill of divorce was required, given in the presence of seven witnesses, as also the public registration of the divorce. In the year A.D. 331 the Emperor Constantine, the first Christian Emperor, laid down certain causes for which divorce was legally procurable

without penalties, viz. adultery, murder, preparing of poisons, and violation of tombs, but he did not interfere with divorce by mutual consent. About the year A.D. 500 the Emperor Justinian for the first time restricted the freedom of divorce by consent without law, and finally allowed very few causes for divorce, viz. adultery, long captivity, and reversion to monasticism. He prohibited 'divorce by mutual consent' under penalty of forfeiture of estates and retirement into monasteries. This prohibition was repealed by his successor Justin (whose law was in force till 900), on the ground, as stated in the novel, that 'it was difficult to reconcile those who once came to hate each other, and who, if compelled to live together, frequently attempted each other's lives.' Solomon says on the same subject: 'A hated woman when she is married is a thing which the earth cannot bear.' Gibbon describes the change in

a well-known passage as follows : ' He yielded to the prayers of his unhappy subjects and restored the liberty of divorce by mutual consent : the civilians were unanimous, the theologians were divided, and the ambiguous word which contains the precept of Christ is flexible to any interpretation that the wisdom of a legislature can command.'

The Christian Church in the meanwhile had obtained from the Emperor Constantine the right of establishing Ecclesiastical Courts (A.D. 331), which existed and exercised jurisdiction side by side with the Civil Courts for many centuries. They administered the Canon Law and Apostolic Constitutions as well as Ecclesiastical Law, and by degrees the whole subject of marriage and divorce passed entirely from the jurisdiction of the Civil Courts into that of the Ecclesiastical. Under their rule the practice grew up in medieval times of asserting that divorce

could never be permitted, and, as appears in the previous chapter, the dogma of marriage being a divine sacrament, and therefore indissoluble, was publicly recognised in A.D. 1164. This opinion was one of gradual growth. Jerome, for example, defended Fabriola for marrying again after divorcing her husband, though he did it on the ground that 'it was better to marry than to burn.' Origen also, and many others, including Tertullian, Ambrose, Chrysostom, Hilary, and Justin Martyr, permitted women after divorce to marry, though their former husbands were alive. It is said, however, that this was 'contrary to scripture.' Many French synods (e.g. those of Vannes in 465 and of Compiègnes in 756) allowed the husband of a wife who has been unfaithful to marry again in her lifetime. Pope Gregory II, in a letter to St. Boniface in the year 726, recommended that the husband of a wife seized by sickness

which prevented cohabitation should not marry again, but left him free to do so provided he maintained his first wife (quoted by Häfele, ' Beiträge,' vol. ii. p. 376). I don't think this a matter of great importance, because whatever opinions were held by the early fathers, the Church always recognised the necessity of annulment for certain causes as well as divorce *a mensa et thoro*, which is the equivalent of our legal separation.

Annulment *ab initio* was allowed for consanguinity and affinity up to the seventh degree, and consanguinity of a spiritual character, such as godparents and godchildren, and even on the ground that a forbidden affinity had been established between persons who had committed adultery ; it was also allowed for impotency and various forms of irregularity in the marriage (see 'Catholic Dictionary,' Impediments of Marriage).

Divorce *a mensa et thoro* was allowed for misconduct.

At the Council of Trent in 1563 the sacramental character of marriage and its indissolubility was laid down for the first time as a matter of law. In England, twenty years before the Council of Trent, a Royal Commission under the Presidency of Archbishop Cranmer was appointed by Henry VIII to consider the whole question. This Commission finished its labours in the reign of Edward VI and recommended the following changes in the 'Reformatio Legum,' compiled under 3 & 4 Edw. VI, c. 11: 'That, in addition to adultery, desertion, continued absence, savage temper and incompatibility of temperament should be good causes for divorce, and that separation without the power of remarriage should be abolished.' Owing chiefly to the death of Edward VI these reforms were not enacted in England,

but in Scotland divorce for adultery was adopted equally for husband and wife at the time of the Reformation, and in 1573 malicious desertion was also accepted there as a good cause for divorce. The Lutheran theologians from the Reformation times down to the present day, with scarcely an exception, have recognised two scriptural grounds of divorce, namely, adultery (Matt. v. 32, xix. 5–9), and wilful or malicious desertion (1 Cor. vii. 15). In Elizabeth's reign certain decrees of divorce were pronounced by the Ecclesiastical Courts for adultery, but they were stopped by the Star Chamber, and the whole question continued to be regulated by the Canon Law in England, in spite of the Reformation, right up to the middle of the nineteenth century. This is the more extraordinary when it is remembered that in Western Europe, from the beginning of the thirteenth

century, there had been a movement against the power of the Church underlying all human relations which culminated for Germany in Luther's Confession of the Protestant Faith at Augsburg in 1530, and for England in Henry VIII's schism from Rome in 1532. The result for the English people was that, although divorce for adultery was frequently admitted in practice by ecclesiastical authority, the question was theoretically left in doubt. The difficulty was got over by Church fictions of consanguinity or affinity, and from A.D. 1669 to 1857 by private Acts of Parliament for those who could afford it, and for those who could not afford it the consequences, however immoral, were left to take care of themselves. By the Common Law of England, which stood intact till the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), came into operation on January 1, 1858, the legal relation of husband and wife, if once

subsisting, could only be dissolved by the death of either party. The only means of legally dissolving the relation during the lives of the parties joined was an Act of Parliament (as an exceptional act of sovereignty), which is still the law of Ireland and applicable to persons of Irish domicile. Small wonder that Selden wrote: 'Marriage is a desperate thing. The frogs in Æsop were extremely wise; they had a great mind to some water, but they would not leap into the well because they could not get out again.'

With regard to matrimonial fictions, Bishop Creighton wrote: 'Marriage was a sacrament; matrimony was indissoluble. But a good many people wished to dissolve it, and a means for this purpose was discovered by fencing round matrimony with so many protections that it was really doubtful if anyone was lawfully married or not.' Their importance consists in the

recognition by the Church that as marriage was necessary for the needs of humanity so divorce was necessary for the proper regulation of marriage. Their absurdity consists in the fact that for practical purposes only the rich had the slightest chance of obtaining the necessary decree. When Sir John Paston desired a papal dispensation from a matrimonial engagement, the possible cost thereof is shown in a letter written by him to his brother, dated London, Monday, November 22, 1473, wherein he says: 'I have answer again from Rome that there is the well of grace and salve sufficient for such a sore and that I may be dispensed with; nevertheless my proctor there asketh a thousand ducats as he deemeth;' and Sir John adds: 'Another Rome runner here has told me as he means but a hundred ducats or two hundred at the most'; and a friend writing to Paston about this time informed

him that this kind of transaction was of almost daily occurrence—'Papa hoc fecit hodiernis diebus multocieno.' This is still further emphasised by the private Act of Parliament, to obtain which a very elaborate and expensive process was necessary. To make this clear I cannot do better than quote Mr. Justice Maule's famous address to a man charged before him with bigamy in 1845. 'You should have gone to the Ecclesiastical Courts and obtained a divorce *a mensa et thoro*, then you should have brought an action and obtained damages which the other side would probably not have been able to pay; and you would have had to pay your own costs, perhaps a hundred or a hundred and fifty pounds. Then you should have proceeded to the House of Lords, where, having proved that these preliminaries had been complied with, you would have been able to marry again. The expense might

amount to five or six hundred, or perhaps a thousand pounds. You say you are a poor man, and have not as many pence. But I must tell you that there is not one law for the rich and another for the poor.' It must be remembered that these Acts of Parliament were passed as a matter of course by the Bench of Bishops, so that, as Archbishop Manners Sutton said in 1809, 'By the divine law there was a liberty' (i.e. for divorced persons) 'to marry again or else unquestionably that reverend Bench would before now have interposed.' This position was, of course, maintained by Archbishop Sumner and Tait, then Bishop of London, when they supported the Divorce Act of 1857. These private Acts of Parliament are still the remedy not only in Ireland but also in the Roman Catholic provinces of Canada.

This ridiculous and impossible condition of things led, as might have been expected, to

such immorality and defiance of law that a Royal Commission was appointed in 1850 to inquire into the matter and suggest a remedy. As W. H. Bishop says: 'Second marriages without divorce, adultery and illegitimate children were of everyday occurrence, while polygamy was winked at though a felony on the Statute Book.' The final result of this Commission was the Divorce Act of 1857. The right of remarriage after divorce for those whose marriage bond was in fact broken seemed urgently desirable in the interest of general morality, and the only question appeared to be the extent to which this right should be given. Public opinion had become lax, because the existing law was felt to be unsuitable, a condition of things which once realised cannot be continued with impunity. And yet the proposed change, although in accordance with the views of every other Protestant country, as well as the

Greek Church, was bitterly opposed by Mr. Gladstone and the Anglican party. It was, however, supported, as before mentioned, by Archbishop Sumner and Tait, who was then Bishop of London, and nine other bishops, and Lord Chancellor Lyndhurst not only supported it, but pleaded at the same time most earnestly for an extension of the law to wilful desertion as a cause for divorce, on the ground that ' it is likely to contribute to greater propriety of conduct because it makes the contract much more dependent on the exertions of the parties themselves.' This is the argument which prevailed with the Commissioners in Edward VI's time, and has since prevailed with every Protestant country except our own. I have been told on good authority that amongst the Jews of Bombay there is absolute freedom of divorce by consent for both sexes, and its effect upon conduct is such that divorce never in fact takes place.

I am not arguing for such complete liberty in this country, but it cannot be too strongly insisted upon that greater individual freedom invariably creates a greater sense of individual responsibility. The effect of the opposition was to make the law of 1857 wholly inadequate for its purpose and unequal in its application, but its importance was great in establishing the right of divorce at all, and creating a court of civil jurisdiction for matrimonial causes.

Its main provisions may be summarised as follows :—

1. All jurisdiction in matrimonial matters is vested in the Civil Court of Divorce.

2. Cause for divorce against a woman is adultery. The husband may claim damages against the co-respondent for the loss of his wife.

3. Cause for divorce against a man is adultery coupled with cruelty or desertion for

more than two years; bigamy and adultery, incestuous adultery or rape, alone; and unnatural offence. The wife cannot claim damages for loss of her husband, but the Court may order the husband to pay maintenance.

4. Judicial separation is substituted for the ecclesiastical separation *a mensa et thoro*, and may be obtained by either husband or wife for adultery, or cruelty, or desertion for two or more years.

5. No divorce is granted where collusion between the parties is proved.

6. No decree of divorce is to be made absolute till six months have elapsed, during which time the King's Proctor may oppose the decree for collusion or on the ground of new facts.

7. No remarriage is permitted to judicially separated persons.

8. Remarriage after divorce is permitted, but no clergyman of the United Church of

England and Ireland is compelled to solemnise the remarriage.

9. Nullity of marriage may be decreed for impotence, consanguinity, and insanity at date of marriage.

10. Either husband or wife may sue for restitution of conjugal rights. The Court can order the delinquent to return to live under the same roof, and in case of refusal allow a suit for judicial separation on account of desertion, but not of divorce.

It will be observed that the object of the Act appears to be a concentration of remedies rather than a reform of the law. It has in effect brought the remedy of divorce within reach of the middle classes, but it has entirely failed to reach the bulk of the nation, the working classes and the poor. The cost of a decree is approximately £100. Besides this, it is open to grave criticism on the ground that it is unjust, illogical and immoral. It

sets up a different standard of offence for the two sexes. It inflicts the heavier penalty of separation for the lesser offences; and it enables the suitor to choose which punishment he or she will inflict, which is often unjust. In refusing to grant divorce, except for adultery, it actually encourages immorality, and in granting separations without the power of remarriage it promotes immorality, illegitimacy, and concubinage. It is illogical if it professes to have in view the maintenance of the objects of marriage, because, as Mr. Gladstone argued, 'We have many causes more fatal to the great obligations of marriage (than adultery), such as disease, idiocy, crime involving punishment for life, and which, if the bond be dissoluble, might be urged as a reason for divorce.' It certainly should, to be logical, have included as causes for divorce, permanent desertion and insanity, even if it rejected chronic alcoholism.

It will naturally be a matter of surprise and wonder that, with so much evidence of evils to be remedied, so little was accomplished or even attempted by this Act. It must be remembered, however, that the men of the nation were not enfranchised until ten years later, in 1867, and that the interests of the voteless are invariably misunderstood or neglected by those whose professed duty it is to safeguard them.

The obvious defect of the Divorce Act, that it was a law for the rich and not for the poor, was attempted to be remedied by the Summary Jurisdiction Matrimonial Causes Act, 1895, which enables a wife to obtain a judicial separation before a magistrate with little cost for—

1. Aggravated assault.
2. Persistent cruelty.
3. Desertion.
4. Neglect to maintain.

But just as the Divorce Act limited its attention to the physical offences against marriage, so this Act is limited to relief of obvious misery without regard to the moral consequences. It has given a very necessary protection to thousands of women from actual danger and distress, but it has enforced upon them and upon their husbands in exchange a life of celibacy or immorality. It has, without any good cause, failed to give the husband any share in these remedies, but what is most important is that it has failed to give the wife any remedy for the adultery of her husband. On two or three occasions I have had a wife seek relief because her husband had compelled her to sleep in the kitchen while he took a strange woman into his bed. In each case the husband had carefully refrained from cruelty in the shape of violence, he had not deserted his wife nor neglected to maintain her. The Summary

Jurisdiction Act gave her no remedy, and she was obliged to put up with it or go to the Divorce Court at a cost which was known to be absolutely prohibitive. Prolonged or permanent separations necessarily lead to immorality or breach of law in many cases, and as a remedy for matrimonial offences can only be looked upon as a failure in legislation from the national point of view. A further attempt was made to meet the matrimonial difficulties of the poor by the Licensing Act of 1902 (2 Edward VII, c. 28, s. 5), which gave either husband or wife the remedy of separation in a police court for habitual drunkenness. This Act, like its predecessors, suffers from a total disregard of the moral consequences. For a woman to get a temporary separation from her husband under this Act is a good thing, because it often leads to his reformation; but for a man to get a separation from his wife and merely make

her an allowance of six or seven shillings a week is to court disaster for the woman. The separation is sure to become permanent unless power is given to a magistrate to send her to a home for a time whether she consent or not; in that case she may have some chance of being restored to sobriety, and to her husband.

I doubt whether from a moral point of view the English nation is much improved since the time of 1850, when a Royal Commission was appointed to seek a remedy. It is certain that an increasing number of persons refuse any longer to submit to conditions which are replete to them with indignities and miseries, no matter by what authority or alleged necessity they are imposed, and, because they find no remedy in law, too frequently relapse into ties unsanctioned by morality. It is reported by Court missionaries and other experienced persons that in

many parts of London little or no regard for marriage is to be found.

In 1900, 6661 separation orders were made by courts of summary jurisdiction in England and Wales, and that number has been maintained or slightly increased ever since, so that some idea can be formed of the immense number of persons in the country who, for purposes of immorality, are divorced, but not for purposes of morality.

During the last fifteen years over 200,000 married persons in England and Wales have been separated by legal process either in courts of summary jurisdiction or in the High Court, and it is estimated that, in addition, at least 50,000 persons have, during the same period, separated by private agreement, making a grand total of 250,000 persons who have been legally separated, i.e. divorced without the power of remarriage.

In the same year 1900 there were 40,000

bastards born, and it is not too much to say that deserted wives form a large proportion of the population in our workhouses. These figures are surely calculated to make the most prejudiced admit that the remedy of separation is attended by fearful consequences, whatever the result of granting divorce might be.

The advocates of judicial separation cling pathetically to the plea that 'it leaves open always the possibility of reconciliation,' whereas divorce closes it. This is more than a vain plea, it is a cruel one, at the expense of others whose miseries are appreciated only by those who diligently study the question, or are gifted with keen and sympathetic imagination.[1] It is also urged

[1] The Bishop of Birmingham in explaining, before the Royal Commission, the indissolubility of the Christian marriage tie, said that he would not give release even to a woman forced by her husband to earn her living upon the streets. He would give her only the protection of separation.

by some that there is no demand for divorce. The desire for relief is shown by those numbers who have sought the remedy of separation without the power of remarriage; but who calls for a demand when he is faced by a crying injustice, and a condition of gross immorality? Those who suffer shipwreck in marriage are naturally reticent, and women, upon whom the dangers and possible miseries of marriage mostly fall, are made dumb by law for all legislative purposes. The contented are generally apt to miss the cry of distress from the unhappy, but they add insult to injury when they blame the unhappy for failing to enlist their sympathy. It is becoming a stock phrase for prejudiced persons who are troubled by conscience to repeat, 'Yes, the demand is clearly just and expedient, but I doubt whether a majority of the persons concerned are in favour of it.' There is no

substance whatever in this plea. It has happened before now that divorced persons have been reconciled and married again, though, of course, the miseries of separation render the chances of husband and wife coming together again greater. But experience is clear upon this point that such coming together is mostly due to economic considerations, it is often obtained by duress, and if the separation has been at all prolonged, instances of true reconciliation are so rare as to be a negligible quantity for practical minds.

The real reason for clinging to separation is the prejudice against innovation, mistrust about the verbal interpretation of our Lord's words, and the very decided leaning of large numbers of Church people to the Roman Catholic dogma of sacramental indissolubility.

The best way of understanding the unique position of this country in regard to divorce

is to compare it with other Protestant countries throughout the world.

In modern England the State is at present actively promoting in every police court the separation of husband and wife without the possibility of remarriage, and it legalises and enforces voluntary separations, both public and private, in every class of life.

In modern Germany the separation of husband and wife without power of remarriage is not recognised by the State, except in the case of Roman Catholics, and even then a separation is subsequently convertible into a divorce at the option of either party. The remedy of separation, whether voluntary or compulsory, is condemned as contrary to public policy.

On the Continent marriage by arrangement is the rule, and liberty to break it has been enlarged. In England marriage is

supposed to be by consent, and liberty to break it has been exceptionally restricted.

The study of legal statistics of divorce cannot, of course, give anything like an accurate account of the marriages in each country which have, in fact, failed to fulfil their purpose, because so many persons of both sexes are naturally or by training accustomed to submit to every sort of indignity and trouble rather than break up the family, or reveal their unhappiness to the world; but no fault can be found with a table of comparison when it is remembered that all the figures are subject to the same criticism. At any rate, as many English people are inclined to find satisfaction in the small number of the divorces obtained in this country, it is of vital importance to inquire whether this self-satisfaction is well founded or whether it is delusive, and evidence only that the institution of marriage

is more strictly preserved in this country by disregard of human happiness, and at the expense of the wives, the poorer and more ignorant part of the population and national morality. It must often seem like irony to insist upon the apostolic injunction to 'rejoice evermore' when dealing with those who, by our own legislative acts, are made so fast in a prison of soul-crushing unhappiness that they cannot get forth.

The following table, supplied by the Divorce Reform Union, shows the number of divorces and marriages in all Protestant countries, or amongst Protestants in Roman Catholic countries, wherever statistics are available, together with the causes which have been admitted for divorce. The figures parallel to the name of each country represent, where obtainable, the number of marriages and divorces in the stated year, and the proportion of divorces per 1000 marriages approximately.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Austria . .	1900	214,214, less Roman Catholics, say, 160,000 — 54,214	1,313	24·1	Adultery. Condemnation for crime. Wilful desertion. Immoral habits. Infectious diseases. Ill-treatment. Threats. Serious vexations. *Unconquerable aversion after separation has been tried* and found useless.
Hungary . .	1900	169,687, less Roman Catholics, say, 82,031 — 87,656	2,066	23·5	
Bavaria . .	1901	49,277	500	10	Adultery. Malicious desertion. Local desertion. Condemnation to imprisonment for ten years. Murderous attempt on partner or child. *Marked enmity, dislike, and aversion, after separation has been tried.*
Belgium . .	1901	57,131	891	14·5	Wife's adultery. Husband's habitual adultery in his home. Outrageous conduct. Ill-usage. Grievous injury. Condemnation to infamous punishment. *Unwavering and legal expression of parties that their common life is insupportable.*

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Denmark . .	1900	18,500	391	21·5	Concealed impotency. Leprosy. Incurable insanity. Adultery. Bigamy. Penal servitude for three years. Separation for three years.
England and Wales	1900	257,480	700	2·5	Wife's adultery. Husband's adultery, coupled with cruelty or desertion for two years. Bigamy. Unnatural crime. Rape.
France . .	1900	299,084	7,157	23·9	Adultery. Acts of violence, *including abusive language*. Desertion. Continued refusal. Disease. Habitual drunkenness. Concealed premarital unchastity of the wife. Conviction for crime over five years. Separation after three years.
Germany . .	1899	471,519	14,142	30	Adultery. Desertion. Refusal. Impotence. Disease. Insanity, but not idiocy. Acts of violence or *gross abuse*. Confinement for crime in a fortress, or flight to avoid such punishment. Drunkenness and incurable extravagance. Refusal of maintenance. *Insuperable aversion.*

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Greece . .	No returns of divorce		available		Treason. Wife's adultery. Wife's attempt on husband's life. Wife's abortion. Husband's adultery. Impotence. Monasticism. (There are also several trivial offences descended from antique Byzantine Law, which are falling into disuse.)
Luxembourg .	No returns of divorce available at present				Wife's adultery. Husband's adultery under common roof. Acts of violence, *including threatening language.* Condemnation to a dishonouring penalty. *Unwavering and legal expression of parties that common life is insupportable.*
Netherlands .	1901	40,261	561	14	Adultery. Malicious desertion. Imprisonment for four years. Acts of dangerous violence.
Roumania. .	No returns of divorce		available		Adultery. Acts of ill-treatment. Acts of excess. Condemnation to penal servitude. *Threatening language. Mutual consent of parties legally expressed that common life is insupportable.*

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Russia . .	Russo-Greek Church, as per Yverne's report . .			1·7	Adultery. Impotence. Sentence involving deportation. Desertion for five years. Concealed premarital unchastity. Murderous attempt. Refusal. Incurable disease. Insanity. Depravity of life. Cruelty. Grave crime. Penal exile.
	Lutheran Church, ditto . .			6·7	
N.B.—The latest Russian statistics available give the average rate of divorce to 10,000 marriages between 1867–1886 as 14·7, *i.e.* as 1·4 to 1,000 marriages. They appear to make no distinction between the figures for the two Churches mentioned above.					
Saxony . .	1900	37,986	865	22·7	Adultery. Unnatural offence. Bigamy. Desertion for one year. Incurable drunkenness. Self-mutilation. Dangerous cruelty. Condemnation for three years. *Change of religion.*
Servia . .	1899	24,456	340	14	Adultery. Treason. Murderous attempts. Secession from Christianity. False accusation of immorality. Imprisonment for seven years. Desertion for seven years. Wilful desertion for four years.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Scotland . .	1900	32,449	195	6	Adultery. Malicious desertion. Bigamy. Unnatural crime. Rape.
Sweden . .	1899	31,710	387	12	Adultery. Infidelity after betrothal. Incurable disease. Murderous attempt. Insanity over three years, declared incurable. *Mutual aversion.* Sentence to loss of civil rights. Conviction of grave crime. *Prodigality. Drunkenness. Violent temper.*
Norway . .	1899	15,530	121	7·8	Adultery. Unnatural crime. Bigamy. Malicious desertion for three years. Disappearance for seven years. Penal servitude over seven years. Impotency. Leprosy, or incurable disease.
Switzerland .	1901	25,379	1,027	40	Adultery. Murderous attempt. Ill-usage. Sentence to degrading punishment. Wilful desertion for two years. Incurable insanity for three years.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
United States of America .	No official returns are available for a later period than the years between 1867–1886; and in those returns only fifteen States give statistics of marriage and divorce which are pronounced to be even approximately correct. So far as the incomplete returns of these fifteen States go, they seem to show the proportion of 55·5 *per mille*; but this figure is quite unreliable, and should be disregarded. There were some fifty States in the Union in 1886.				Vary very much. South Carolina alone permits no divorce. Broadly the following causes are good:—Adultery. Bigamy. Impotence. Idiocy. Wilful desertion (for period varying between six months and five years; fifteen States decree one year; three States five years; one State six months). Felony. Unnatural crime. Imprisonment (one State seven years, and so on down through less periods to one year in New Hampshire). Extreme cruelty.
BRITISH COLONIES.					
Canada (generally)	1900	33,316, less Roman Catholics, 13,316 / 20,000	19	1	Adultery by wife. Incestuous adultery of husband. Bigamy. Unnatural crime. Adultery and cruelty. Adultery and desertion.

NOTE.—In Ontario, Quebec, North-West Territories, and Manitoba, divorce can only be obtained by Act of Parliament.

Country.	Years.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Cape of Good Hope	1901	9,243	78	8·4	Adultery. Malicious desertion. Unnatural crime. Perpetual imprisonment. Long absence. Refusal.
Natal . .	1901	1,368	7	5·1	Adultery. Malicious desertion for eighteen months.
Newfoundland .		No divorce exists			Appears to have no law of divorce.
New South Wales	1900	9,996, less Roman Catholics, 1,964 — 8,032	216	26·9	Adultery. Unnatural crime. Wilful desertion for three years. Continued drunkenness and refusal of support for two years. Imprisonment for seven years. Frequent conviction and denial of support. Murderous assault. Repeated cruelty during two years.
Queensland .	1900	3,371	12	3·5	Almost identical with England.
South Australia .	1900	2,305	7	3	The same as in England.
Tasmania . .	1900	1,332	4	3	The same as in England.

Country.	Year.	Marriages.	Divorces.	Proportion of Divorces per Mille.	Good Cause for Divorce.
Victoria . .	1900	8,308, less Roman Catholics, 1,268 7,040	105	14·9	Adultery. Wilful desertion for three years. Habitual drunkenness for three years coupled with denial of support or cruelty. Imprisonment for seven years. Frequent conviction and denial of support. Murderous assault.
New Zealand .	1900	5,860	85	14·5	Adultery. Wilful desertion for five years. Habitual drunkenness and failure to support, or drunkenness and neglect. Penal servitude for seven years. Murderous attempts.
West Australia .	1900	1,781, less Roman Catholics, 334 1,447	16	11	The same as in England.

From this table it will be seen that there are no Protestant countries in the world, except England and five or six of her colonies, which require that adultery on the part of the man should be combined with cruelty or desertion to justify divorce. Everywhere else the wife is allowed divorce for adultery equally with the husband.

Almost every country and every colony, except those which have our own laws of divorce, include among the good causes of divorce desertion, prolonged separation or imprisonment for some term or other. We learn further that cruelty, habitual drunkenness, and incurable insanity are also causes very generally accepted.

One of the first acts of the New Portuguese Republic on November 2, 1910, was to draft the divorce laws as follows:—

'Divorce is granted on account of adultery, ten years' desertion, insanity if

pronounced incurable after three years, imprisonment for a long term, or by mutual consent. The custody of the children is given to the applicant for divorce or to the nearest relative, but they must be maintained by the divorced parties. Alimony is payable to either of the parties who may be without means, but is terminable on the marriage of the recipient or in the case of immoral conduct. The divorced person forfeits the benefits of the marriage contract. Divorce by mutual consent will only be granted after two years of married life, both parties must be over twenty-five years of age, and the decree will not be made absolute until the application of the parties after one year's trial. Divorced women may only marry after an interval of one year, and men after six months. A child born within 300 days after divorce will be considered legitimate.'

It is well to bear in mind before we

consider the comparative figures that the intention of all divorce laws is primarily an intention of restraint. Divorce is, in fact, as before stated, in the nature of a punishment to the guilty party as well as a relief to the innocent one. The wider, therefore, the laws are, the greater the number of persons who are brought under restraint, and the more their effect should tend to morality so long as their severity is not of such a nature as to produce rebellion, nor their extension so wide as to conduce to laxity. It is clear that the ratio of divorce taken per thousand marriages will, as a rule, vary according to the facilities granted by the divorce laws up to a reasonable standard; the exceptions make us realise that the morality of a nation depends upon something other than artificial regulations of the State, and that the power of legislation to affect conduct is remarkably limited.

In England and Wales the ratio is 2·5, in Scotland it is 6 per thousand marriages; and in Scotland the rule since the Reformation has been to recognise sex equality in the matter of adultery, and to include malicious desertion as a cause for divorce.

In European countries we find with some surprise that Switzerland heads the list with forty divorces per thousand marriages. Germany comes next with a ratio of thirty divorces. The causes for divorce in Switzerland are adultery, murderous attempt, ill-usage, sentence to degrading punishment, wilful desertion for two years and incurable insanity for three years. In Germany they are adultery, desertion, refusal, impotence, disease, insanity, but not idiocy, acts of violence or gross abuse, confinement for crime in a fortress, or flight to avoid such punishment, drunkenness and incurable extravagance, refusal of maintenance, insuperable aversion.

This shows at once how difficult it is to forecast the result of a change in the laws, seeing that Switzerland, with a law less wide than that of Germany, reveals a higher divorce rate by 33 per cent.

Again, let us compare the Netherlands with Sweden. The causes in the former country are confined to adultery, malicious desertion, imprisonment for four years, and acts of dangerous violence, and we find the ratio of divorce is 14 per thousand marriages; and in Sweden, where the causes comprise adultery, infidelity after betrothal, incurable disease, murderous attempt, insanity over three years declared incurable, mutual aversion, sentence to loss of civil rights, conviction of grave crime, prodigality, drunkenness and violent temper, we find the lesser ratio of 12 per thousand marriages.

Turning to the colonies we notice that New South Wales and Victoria have widened

the laws by adopting, as in New Zealand, the equality of the sexes in regard to adultery, and including such causes as malicious desertion, long term of imprisonment, drunkenness, murderous assault, repeated cruelty, denial of support, and refusal. Victoria and New Zealand show an almost identical ratio of 14·9 and 14·5, that is to say, their laws are practically identical, and their ratio is identical. New South Wales, which has the widest laws, reveals a ratio of 26 per thousand, but this high ratio is said to have been exceptional, owing to an accumulation of cases before the passing of its Divorce Act of 1892 (the census was taken in 1900). The Cape of Good Hope, with a more restricted Divorce Law, has a ratio of only 8·4 per thousand marriages, and Natal, with still greater restrictions, has 5·1. The Colonies which have maintained the strictness of the English law, and upheld sex

inequality, show a ratio of 3 per thousand, very much like that of England and Wales (2·5); and Canada also, with a law similar to that of England, has a ratio so low as 1 per thousand marriages; but this is fully accounted for by the fact that in four of her provinces it is still necessary to obtain an Act of Parliament to procure a divorce, and the expense is prohibitive. Moreover, it has to be observed that in the United States for the twenty years 1887–1908 there were 6000 divorces granted to Canadians who had acquired a residence in the U.S.A. for the ostensible purpose of getting divorces. That gives an average of 300 divorces per annum, which added to those obtained in Canada makes the divorce rate there 5·26 per thousand against the rate of two in England and Wales, and shows how the stringency of divorce laws may result in loss of citizens.

These figures show the working of the

rule, just as in Roman Catholic countries where no divorces are allowed by law the returns are nil, as, for example, in Italy, Spain, and South Carolina. But nobody would seriously maintain that this absence of legal divorce, where none can be obtained, is an index of greater morality in these countries. In fact, in South Carolina, the only State in the American Union which has no divorce laws and consequently no divorces, according to an eminent authority concubinage is so generally recognised that the laws of inheritance have had to be modified.

'South Carolina has found it necessary to regulate by law the proportion of his property which a married man may give to the woman with whom he has been living in violation of the law.'—Judge Stevens (*The Outlook*, June 8, 1907, p. 288).

There are, however, many people who still think it a matter of congratulation that

in England we can produce such low figures as a divorce rate of 2·5 per thousand marriages, presumably considering that this is an indication of greater national morality. I would have them consider in the first place that wives cannot obtain divorce for the adultery of their husbands, and that the bulk of our population is excluded from the divorce law by want of means—so that, to be accurate, we must add to the rate of 2·5 divorce returns a rate to represent the separations which the poor have had to adopt as a substitute, because a legal separation is equivalent to divorce without the power of remarriage. It will be found that not less than 7000 separations are granted under the Matrimonial Causes Act every year in the police courts of England and Wales, and if these are added to the divorces the ratio for England rises to the figure of 27·9 per thousand marriages, which is consider-

ably larger than that of France. I know it will be said that many of these separations are followed by reconciliation, but, as I have before observed, this confidence is far from being justified by experience. On the other hand, experience does show the disastrous effect of compelling a large portion of our population to choose between celibacy and immorality; and it is impossible to think with complacency of our national morality so long as our police courts are perpetually occupied in dealing with disorderly houses and, as has been before stated, 40,000 illegitimate children are born every year in England and Wales, to say nothing of the deserted wives who are so frequently found in our workhouses.

I now turn to the United States, which deserves some particular consideration because it is so frequently referred to by the opponents of divorce as a warning to those who would increase the facilities in this

country. It is difficult to get accurate figures from all the fifty States and territories, and it would be beyond the scope of this work to discuss them in detail if they were available, but there is no doubt that the divorce rate in America is larger than in any other country, and that it shows a decided tendency to increase.

The Recommendation of the National Congress on uniform divorce in 1905 was to limit the causes of divorce to the following, namely :

A. Causes for annulment of the marriage contract.

1. Impotency.
2. Consanguinity and affinity properly limited.
3. Existing marriage.
4. Fraud.
5. Insanity, unknown to the other party.

B. Causes for Divorce *a vinculo.*

1. Adultery.
2. Bigamy.
3. Conviction of crime involving two years' imprisonment.
4. Intolerable cruelty.
5. Wilful desertion for two years.
6. Habitual drunkenness.

C. Causes for legal separation or divorce *a mensa.*

1. Adultery.
2. Intolerable cruelty.
3. Wilful desertion for two years.
4. Hopeless insanity of husband.
5. Habitual drunkenness.

From a reformer's point of view the important thing to ascertain is how far the increased and rising rate is due to changes in the law. Professor Willcox, in his study of the influence of legislation on divorce, demonstrates conclusively that there is practically no causal

connexion between the changes in the law and the rise in the divorce rate, after the average standard of facility has been reached. This may be doubted by the casual observer who seeks in statistics only that which he desires to find, but the earnest student will find it curiously confirmed by an impartial examination of the figures. In the first place, the whole trend of legislation and administration in America has of late years been towards greater stringency in regard to remarriage of divorced persons, but it has had no effect upon the rising rate. In the second place, a study of the changes in causes reveals the fact that in no instance is there the slightest suggestion that the divorce rate has been materially influenced by the introduction of new causes.

Restrictions upon remarriage are very general and based upon the assumption that persons who seek divorce do so in

order that they may immediately remarry. Statistics prove that this popular idea is erroneous. The marriage rate of divorced persons is practically the same as that of widows and widowers, and of such marriages during the period from 1887 to 1906 only 12·7 per cent. took place within a year from separation, while 72·2 per cent. ranged between one and five years. Professor Willcox says that the only perceptible influence of restriction on marriage is to increase illegitimacy, but it is extremely important to remember that the increasing knowledge of means to prevent conception has rendered statistics of illegitimacy much less reliable than they used to be. It is also to be noted that raising the age for the marriage of minors or the age below which the consent of parents is required has had practically no effect. Marriages have been deferred at the same

rate, whether these changes have been made or not, so that we must infer that the cause is economical rather than legal.

The interesting conclusion from a study of these statistics is that within certain reasonable limits legislative restrictions or facilities have strangely little effect upon the number of divorces. Secondly, as Mr. Bryce, our Ambassador, says, 'On the whole, there seems to be no ground for concluding that the increase of divorce in America necessarily points to a decline in the standard of domestic morality, except perhaps in a small section of the wealthy class, though it must be admitted that if this increase should continue it may tend to induce such a decline.' The reasons for this increase, which is to be found though in a less degree all over the world, must be sought in more general causes than local legislation. It is an index of many reasons for discontent with the existing

conditions of marriage, and is not by any means necessarily a sign of moral deterioration, but rather the reverse. It marks a period of readjustment which, wisely dealt with, must end in moral advance, and is only likely to be disastrous if met by reaction.

This subject is more fully dealt with in Part III of the following chapter. The refusal of the Church to modify its doctrine and alter its service is due to a very natural reluctance to admit mistake in a matter of vital importance and relinquish control of a sphere which is now shared with the State. But an unchanging Church cannot remain in perfect tune with a changing Society, and no religious influence can be retained if it seems to oppose new moral aspirations.

CHAPTER III

THE ARGUMENTS FOR AND AGAINST INDISSOLUBILITY

(1) The Words of Scripture

'It will best behove our soberness to follow rather what moral Sinai prescribes equal to our strength than fondly to think within our strength all that lost Paradise relates.'—Milton.

Before passing to my own conclusions I think it will be useful to examine shortly the argument of those who maintain that, in spite of everything which can be proved of evil consequences, there should be no changes in the law, and who deprecate the very limited facilities for divorce now existing. I think many persons who hold such views would consider that no argument is required to support them, either because Christ said

'Whom God hath joined together let not man put asunder,' or because the Church has said that marriage is a sacrament and indissoluble —and their devotion to the Church or to the literal words of Scripture is such that they would feel it sacrilegious or sinful to discuss the question. They are like pilots who insist upon steering their vessels by a chart, made in old, unscientific days, on which many rocks and shoals are unmarked, which have been since discovered. Their vessel is constantly jeopardised, and their only remedy is to lighten the ship by letting every passenger who would prefer safer navigation get overboard and find some other vessel if he can, or drown. It is possible to accord some measure of respect for this uncompromising attitude, but it is impossible to feel anything but profound pity for the passengers. The argument for indissolubility is entirely theological, and as such has nothing to do with a practical work; but, in so far as

it has been controverted by theologians, there is some hope of winning assent to a more reasonable view by setting down what has been, and still is, urged on the other side. Milton, Bucer, and many other learned persons have written treatises to prove that in the Bible itself divorce was not only permitted, but even enjoined, in such a way that it is as binding upon Christians as upon Jews. The passage in Malachi upon which they rely for enjoining divorce has no authority whatever in the present translation, and will only appeal to those who choose to accept Calvin's version. Under the circumstances it may be dismissed as unimportant, and reliance must be placed, if at all, upon their other reasoning. They contend that Christ came to fulfil the law, not to break it—St. Matthew v. 17: 'Think not that I am come to destroy the law or the prophets. I am not come to destroy

but to fulfil.' That the law of Moses, which He came to fulfil, permitted divorce at least for adultery or fornication. That when Christ said that for the hardness of men's hearts Moses had permitted them to put away their wives, He could not have meant that Moses had allowed men to do what was in itself sinful, and the proper inference must be that Moses had admitted divorce as a necessity for ordinary human nature living in the world, though for truly spiritual persons it would be unnecessary. This conclusion leads to and accords with the view that Christ, in dealing with this question, was directing His words to the Pharisees, whose conventional, literal and legal attitude of mind was so inimical to anything spiritual and essentially righteous. In doing this Christ is made to speak with unusual precision to enforce His point, but it is doing violence to the passage to suppose that in

contradiction to everything else which He ever said or did He intended by these words to create a new civil law which was to be for ever binding upon His followers. It would be a matter of wonder that He intended to do anything of the kind, and so it is not surprising that the early fathers and the Church for many centuries interpreted the words as a counsel of perfection similar to those contained in the Sermon on the Mount. The spirit of love which should make us love our enemies, or the spirit of charity which should make us give away our cloaks and coats to those who ask for them, would be travestied and rendered ridiculous by literal interpretation. In the same way it is a travesty of divine and spiritual union to insist upon two persons living together who cannot do so without destruction of any true sense of morality. It would be just as wise to forbid savings banks as sinful because

Christ said, 'Ye shall take no thought for the morrow.' But, apart from this reasonable view of Christ's intention in using the words relied upon, there is a way of reading the words themselves which prevents an impracticable and dangerous conclusion.

'Whom God hath joined together' is a phrase of very different meaning according as it is understood in a deeply spiritual sense, or in the literal sense of being married in church by a priest. No right-minded person would quarrel with a prohibition to separate a husband and wife who were spiritually united, because it could not conceivably be done with their consent, and the days of arbitrary conduct towards married persons have passed away. But when a man and woman are united in a church, who have no spiritual communion, but have agreed to marry for some unworthy or frivolous motive, few will be so bold as

to assert that God has joined them together. Many indeed will think that religion suffers serious loss by its frequent association with marriages which are scandals before they have been broken. But where one of the parties is innocent of evil, and has been trapped or coerced into a marriage which is fraught with misery and moral degradation, not only would pity suggest that the tie should be legally broken, but reason would compel the conviction that God was not the author of such a union. There is yet another consideration which makes for a humane and reasonable interpretation. Christ is reported to have said in answer to the remonstrances of His disciples that divorce is not permissible 'except for fornication.' That again is a phrase of deep spiritual significance, or it may be understood in the vulgar and literal sense of the word 'fornication.' It seems impossible to believe that we should be able

to read into it more spirituality than Christ Himself, but if that is the case we must believe that by fornication was intended any sexual intercourse which was not based upon true affection of the heart. Now there can be no doubt whatever that such intercourse is possible in every loveless marriage, and is absolutely certain in every marriage which has in fact been broken in every particular. If that is true, then the Author of the Christian religion did allow divorce as a possible means of raising the standard of morality in marriage to the highest point reached by mankind, and this interpretation would accord with the depth and breadth and liberty of the Gospel in every other direction. Perhaps there is yet another means of meeting the difficulties raised in the minds of churchmen, by a strict interpretation of the word 'solemnisation.' The solemnisation of marriage in the minds of some people assumes that a marriage

has been made when two persons have plighted their troth to each other based upon a true communion of heart and soul, and that the solemnisation is not the making, but the blessing and confirming of what has already been made between the parties. This view, which seems a lofty as well as a reasonable one, would point to marriage being recognised as a civil contract to begin with, and an opportunity being given to all who desire it conscientiously to obtain the blessing and confirmation of their particular Church afterwards. It seems to be inviting disaster to give religious sanction to worldly and impious marriages without any warranty for supposing that the parties have any religious feeling in the matter, as it is unchristian in the highest degree to refuse the blessing and consolation of religion to an innocent man or woman who desires it, simply because he or she has been first released

from an impossible or morally degrading marriage.

Too much account is made in these matters of what is called 'the world's opinion,' for 'the world,' as Balzac said, 'gives the lie to the law alike in its rejoicings, in its habits, and in its pleasures, and is severer than either the Code or the Church; the world punishes a blunder after encouraging hypocrisy.'

(2) The Children

'Children tell in the highway what they hear by the fireside.'—*Portuguese Proverb.*

The second argument for indissolubility is that a broken marriage must be fatal to the interests of the children and that there is no place like home.[1] This argument is

[1] I remember the case of a poor woman who came to my court for help because her drunken husband had beaten her and turned her out of doors. I sent the Court Missionary to see if he could do any good. He found

frankly utilitarian and its force must depend upon the advantage to children of living with parents who have ceased to be husband and wife except in name, as compared with possible arrangements for their welfare when the parents have been legally as well as practically parted the one from the other. It cannot be doubtful that an atmosphere of constant bickering and contention is the worst possible for a child to be brought up in, seeing that children have more need of models than of critics. To suppose that no commendable alternative can be suggested betrays a remarkable want of faith in human nature. The law which is man-made has not yet shown any proper regard for the rights of a mother under any circumstances. She is the parent who has submitted to suffering

the place deserted by the husband, and everything in the house broken except a framed text which was hanging on one of the walls. The words of the text were: 'There is no place like home.'

and the risk of life in the birth of the child, and it is upon her constant care—amounting often to devoted sacrifice—that the child depends during all the years of infancy; but in the eye of the law she is not a parent at all if the father is alive and has been guilty of no misconduct. He remains sole guardian of all children born in marriage, and alone has power over them. He alone has the right to determine the religion, the education and the careers of his children, whether they be boys or girls. He may send them abroad to be educated or to earn their living against the wishes of the mother. When 'a parent' has a right to claim exemption under the Vaccination Act magistrates have definitely refused to recognise the mother as a parent if the father is alive. It is true that by the Guardianship of Infants Act, 1886, some modification has been made, in that after her husband's death a woman

may be sole guardian of her children or guardian in conjunction with another appointed by the husband; and by section 5 the mother of any infant may apply to the Court for an order respecting 'the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father.' This provision is of the highest importance, but it is hardly necessary to point out that only comparatively rich women could avail themselves of it, or such women as come before the Court in a matrimonial suit. I know myself of a case where a Protestant man, who married a Protestant woman, subsequently became converted to Roman Catholicism. Several children were born of the marriage, and every one of them soon after birth was taken by the father to be baptised in the Roman Catholic faith,

not only without the consent, but against the earnest wish of the mother, whose own convictions remained unchanged. The law gives no redress to the wife in such a case though she gave herself in marriage (or as the Church service has it was 'given in marriage') upon the implied understanding that as her marriage was a Protestant one, her children would certainly be Protestant too. There is a common but erroneous impression that the father has the right to determine the upbringing of the sons, and the mother that of the daughters. This may be done by agreement, but by law the mother has no such right. In a court of summary jurisdiction when a child is ordered to be sent to an industrial school or a reformatory, the magistrate is bound to select the institution according to the religion of the father, unless the father expresses a wish to the contrary.

The curious and significant fact is that when the parties to a marriage are constrained by their differences to appeal to the law, a more natural and reasonable condition of things is at once established. The Court is made arbiter in the dispute and is given absolute discretion to decide all questions of custody, upbringing and access, and considers first the interests of the children, and, secondly, the interests of the innocent party to the suit. This is provided for by the Matrimonial Causes Act, 1857, s. 35; the Matrimonial Causes Act, 1859, s. 4; the Matrimonial Causes Act, 1884, s. 6; and the Guardianship of Infants Act, 1886, s. 7; as well as by the Summary Jurisdiction (Married Women) Act, 1895. Every case is decided according to its own circumstances without regard to who has the right to the custody at Common Law. This method of dealing with matrimonial

disputes would leave nothing to be desired, if the Court had equal discretion to vary the settlements in all cases. Unfortunately the right of variation is confined to cases where the English Court has pronounced a final decree of divorce, or where a judicial separation is granted for the wife's adultery. Sir George Lewis, whose experience in such cases is unrivalled, declares that in his opinion the law's attitude to women on this matter is nothing short of an outrage. He says: 'If a father has settled thirty or forty thousand pounds upon his daughter, or she has a fortune of her own upon the usual terms giving a second life interest to the husband, and then the capital among the children; if she applies to the Divorce Court to take away the second life interest from the husband, the Courts say: "We have no power to do it. If you had committed adultery we could do it—even if a judicial

separation only was asked for. But as your husband has committed adultery and a judicial separation is granted against him we have no power to do it." Then this lady says, "But I have children. If I die, my husband will enjoy this income and spend it with his mistress, and my children may be in want." The Courts reply, "We cannot help you." And if she has no children when she dies, the husband, who has brought all this misery and degradation and outrage upon her, receives the capital sum which her father has settled on her on her marriage unless special provision is made to the contrary.' Sir George's remarks are based upon a case which came within his own experience.

It is difficult to exaggerate the importance of just laws regulating the economic position of women during marriage, because without some command of money the right to

share in the control and upbringing of the children may be purely nominal.

In my experience I have often heard separated women say that they had never known what it was to enjoy their children until they received a definite sum from their husbands by order of the Court, and could spend it upon their children without being beaten for it.

When Courts have been established for the relief of the poor as well as the rich, it will be desirable that in all cases the magistrate or judge shall have absolute discretion to decide what is best for the children having regard to all the circumstances of each case, economical as well as moral and spiritual.

It will be found more often than is commonly supposed that a mother who has been guilty of misconduct has been more sinned against than sinning, and that

her devotion to her children is such that, unless she may be truly described as immoral in character, or persists in her misconduct, it would be cruel to deprive the children of her care, at any rate during the years of infancy. I mention this because a man's misconduct is too often so little regarded, whereas a woman's is supposed to reasonably deprive her of all human rights, whatever the result may be to the children. The absence of any remedy for a husband's misconduct in the Summary Jurisdiction (Married Women) Act affords the best possible illustration of this.

Let it be remembered, in conclusion, that, in the overwhelming majority of marriages, the natural co-operation of husband and wife leads to the proper upbringing of the children without dispute. We are only concerned with the exceptional cases where disputes have arisen which cannot be

adjusted by the parties. In those cases my contention is that the removal of the children from an atmosphere of misery to one of reasonable happiness, whether it be with the innocent party, as is generally the case, or with a third party, is distinctly conducive to their morality and general well-being; and the decision of an impartial arbiter in such matters is much more likely to be satisfactory than the conclusion of parents who cannot avoid conducting the discussion in a spirit of avowed hostility.

(3) The Increased Divorce Rate

'Freedom and slavery, the one is the name of virtue, the other of vice, and both are acts of the will.'—Epictetus.

'Freedom is only granted us that obedience may be more perfect.'—Ruskin.

The third argument for indissolubility is based upon the fact that the divorce rate, all the world over, shows a tendency to

increase, and the only way to check it is to make the marriage tie unbreakable. This contention assumes that divorce is an evil because it is made known, and that immorality, which is caused by the absence of divorce, may be ignored because it is concealed. Such a view is obviously a shallow one, but, unfortunately, it cannot be maintained without grave danger to national character. This has been pointed out before in dealing with the statistics in Roman Catholic countries, and the devices which are resorted to by the Roman Catholic Church to obtain the advantages of divorce without appearing to admit the principle. What has not been sufficiently insisted upon is that the multiplication of divorces is due, not so much to increased laxity of morals, as to the many causes which in combination represent the modern spirit, and are essential to the progress of the world

towards a higher standard of justice, individual liberty, and happiness. This matter is dealt with at length by Professor Lichtenberger, to whose book on Divorce I would refer my readers. I must content myself with the shortest possible summary. The rise of the divorce rate is due to the problem of adjustment to new conditions and new ideas. The hardships of life in the past afforded a discipline which is considerably lessened by the thousand and one means which have been discovered to make life easier, and men are driven much more than they used to be to make discipline for themselves. The higher standard of living which is desirable for all is not reached without a competition for display which presses hardly upon family resources, and is often a cause of friction. We have passed from an age of comparative simplicity to one of great complication, and dwellers in the

country tend more and more to congregate in cities. The old family which used to be an economic unity has disappeared, and not only is there an absence of necessity for the members to live together, but there is, on the contrary, in nearly every case a necessity to part. This necessity applies increasingly to girls as well as to boys, and to a smaller extent to wives as well as to husbands. Children are no longer educated or trained at home. Even religious instruction is found for them at a Sunday school. The home, therefore, is maintained more for a comfort than a necessity, and if it fails to provide what it is kept for, there is a greater temptation to leave it. The greater number of occupations open to women, the removal of prejudice against female employment, as well as the economic pressure which compels women to leave home, tends to their economic emancipation.

This change is eminently desirable. Human beings are the only animal species in which the female depends upon the male for food, the only animal species in which the sex relation is also an economic relation, and is maintained without any natural period of repose. It is due to this dependence that many women look upon marriage as an economic vocation. They barter their sex capital to a man in exchange for life support, and it is notably due to this class that we have so many 'divorce scandals in high life.' Such divorces must not be confounded with those which are rendered possible by economic independence and arise from a desire for better things. This emancipation is, for the most part, only potential at present, but the improved status of women is a reality. Women are ceasing to be the chattels of fathers and husbands; their increased intellectual training and

rights of property have enlarged their freedom, and with the growth of freedom the patriarchal possessory and purchase systems of marriage must cease. Women are reaching a greater sense of their own personality, which is inconsistent with an unworthy bondage either of thought or of action. Many wives still regard it as a sacred obligation to endure a species of martyrdom in marriage out of reverence for the institution, or in the supposed interests of the children. But an increasing number are coming instinctively to feel that a mode of living cannot be destructive of life and personality, and at the same time in accordance with the highest morality.

Apart from women the tendency of social progress is towards greater respect for the individual. In the American Declaration of Independence it is laid down that institutions exist to promote 'life liberty and the

pursuit of happiness,' and it is not compatible with ideals of justice and freedom that the institution should be held more sacred than the individual. It is for this reason and due to this spirit that fewer men and women will brook infidelity to the marriage tie, and that the amount of cruelty and brutality which women will endure is rapidly diminishing. Popular education has made the evil conditions of life more understood, and proportionately fostered the spirit of revolt. In the sphere of religion character is apt to be more valued than creed, and service than orthodoxy. Morality is less transcendental and more obviously conducive to social happiness. For this reason marriage is more and more thought of as made for men and women rather than men and women for marriage. A dual standard of morality is no longer admissible in practical ethics. The existence and maintenance of

such an idea was largely due to the social inferiority of women which has been spoken of above. As Professor Lichtenberger says: 'Under penalty of starvation for one class and fear of a less luxurious support in idleness for another, wives have often submitted to a double standard of morals repugnant to all their finer sensibilities and sense of justice.' With a truer sense of equality there arises a higher ideal of domestic happiness based upon a real partnership for mutual comfort and support, and a nobler idea of sex relations. A marriage for pecuniary or social advantage becomes increasingly recognised as a form of legalised prostitution, and coercion by Church or State, which compels one person to live with another in repugnant relations, 'does violence to all the higher ethical instincts of the soul.' Popular moral sentiment more than ever regards the ideal marriage as the supreme

method of realising the perpetuity and education of the race. But it recognises worse evils than divorce, and refuses to purchase respect for the conventional marriage tie by the crushing of the human spirit.

In addition to all this growth of freedom and individuality it must be remembered that law, which used to be the privilege of the rich and the educated, has been or is being brought within reach of the poor and ignorant. There is nothing to be wondered at that divorces have shown a tendency to increase under these circumstances. However regrettable from one point of view there is hope in it from another. Herbert Spencer, forecasting the trend of public opinion in this matter many years ago, concludes as follows: 'The changes which may further facilitate divorce under certain conditions are changes which will make those conditions more and more rare.' It is certain

that marriage contracted upon the bases of mutual attraction and companionship, of reciprocal rights and privileges, and of an equal standard of morals is far more likely to survive than the coercive marriage with its inequality, economic dependence, and dual standard of morals. To quote again from Herbert Spencer: 'Marriage will be entered into by choice and maintained by mutual preference.' As greater stress is laid upon the real than the artificial bond, theoretical monogamy will become actual monogamy, and the union will be 'unto death.' The ultimate effect of greater freedom of divorce should be not more but fewer divorces.

CHAPTER IV

CONCLUSIONS

'Justice consists mainly in the granting to every human being due aid in the development of such faculties as he or she possesses for action and enjoyment.'—RUSKIN.

THE conclusions which I would ask my readers to draw from the foregoing study of marriage under modern conditions are that considerable reforms are necessary in the Divorce Law in the interest of national morality, and that they may be reasonably accepted as not impairing, but rather strengthening the sanctity of marriage.

Firstly, as soon as divorce is recognised as a release for innocent persons from a demoralising union, instead of as merely

a cause or encouragement of vice, it will be absolutely impossible to maintain the existing distinction between rich and poor. The relief of divorce, and the hope thereby given of a new life being started under natural and moral conditions, must be brought within reach of all without distinction. To refuse this for fear of certain persons abusing the privilege would be to calm our own fears at the cost of grave and obvious injustice to other persons.

Secondly, when the proposition has been accepted that no true system of ethics can admit distinction of sex, the dual standard of morality will go by the board. There must be equal rights for men and women in the matter of divorce, as well as of separation, in so far as the latter remedy is maintained for matrimonial evils.

Thirdly, when the position of legally

separated persons has been examined and appreciated, it cannot remain unchanged, if any proper regard is to be had for national morality. Everything points to the advisability, if not the necessity, of legal separation being convertible, at some time more or less prolonged, into divorce, because it must be remembered that separations, whether legal or voluntary, are merely divorces without the power of remarriage.

Fourthly, I would add to the existing causes of legal separation, with possibility of divorce, hopeless insanity, persistent inebriety, and constantly recurrent criminality, the hopelessness in each case being determined by lapse of a fixed term as well as by expert opinion. I know what will be said about the ennobling words 'for better or worse,' and about the untrustworthy opinion of experts; my answer is that nobody by the law will be

compelled or even constrained to apply for a divorce. The measure of our sufferings is in ourselves, and those who profess themselves capable of understanding and bearing the sorrows of others would fain get the credit of martyrdom by proxy. They are of small or no account to practical persons. I can only say from experience that I have known many innocent girls married to men who have turned out to be habitual criminals, who wreck their homes, and ruin their wives whenever they return from prison; and I have known many men in the prime of life deprived of their wives owing to insanity, and crippled by weekly payments for their maintenance during twenty or thirty years. These cases have been brought before me by those who sought in vain for a remedy; there was no question whatever of love to be encouraged

or hoped for. Whatever love there originally was had died early, never to rise again, and it seems to me nothing short of cruelty that Society, which owes us happiness as well as security, should leave these unfortunate people in hopeless misery without a chance of escape.

It will be contended that with so many avenues of escape from a legal bond the sanctity of marriage will disappear. That contention presumes a complete want of faith in human nature, and is contradicted by experience. Those who object to the belief that general and particular happiness should be the aim of all legislation forget that human beings have faculties more elevated than the animal appetites, and that, as Stuart Mill has observed, when once made conscious of them, they do not regard anything as happiness which does not include their gratification.

Divorces are not increased by a multiplication of causes except in countries where the law has been like our own of a prohibitive character, and there are remarkable examples of no divorces being applied for where the freedom for both sexes is complete. It is important to move slowly to prevent misunderstanding, and nobody can imagine serious abuse of such causes as insanity, persistent criminality, or hopeless inebriety. There is more room for discussion upon the subjects of wilful desertion and cruelty.

Desertion and refusal of cohabitation are in the same category as causes which make the primary purpose of marriage impossible, such as have been held by the Church to justify annulment, namely impotence and affinity within prohibited degrees. When malicious and prolonged, so that reconciliation may neither be

expected nor desired, it is inhuman to refuse divorce with right of remarriage to the deserted party, and as such right must be reciprocal, the guilty person would also be enabled to marry, but the Church might reasonably refuse to the guilty the consolation of a religious service for a second marriage. In this case divorce should be possible for the deserted party in two years. Moreover, I think it will be found, on reflexion, impossible to stop short of the position taken up in Germany, that persons who agree to separate shall not be allowed to do so permanently, but that either party after a period of five years may apply to the Court to make the separation a divorce. For those who consider such liberty too wide I would suggest that separation would not lightly be agreed to by both parties, especially if there were children of the marriage, and

that after the separation had been prolonged for five years, it may reasonably be assumed that all possible means of effecting a reconciliation would have been exhausted. Agreement to separate is something like collusion in divorce trials.

It is of much interest to note that in Norway, where separations are granted on the mutual request of both parties and where such separations may become absolute divorces after three years, either on the request of both parties, or if circumstances warrant on the request of one party only, divorce is comparatively rare. In 1900 the annual average of divorces taken for a period of five years was 129, or six divorces to each 100,000 of the population.

The cause of cruelty also leads to serious misgiving in those who are reluctant to consider divorce a lesser evil than an impossible marriage; but it is not arguable

by experienced persons that where cruelty has been established the parties to a marriage should be compelled to live together. In most cases there is physical danger to health if not to life involved in the process, and the only real difficulty is to know how far the definition of cruelty should be extended. It is strangely material to limit it to physical causes when everybody knows that moral causes may quite as readily affect people's health as physical causes, and it is always a question of degree. For example, in England we are too ready to meet the complaint of 'gross abuse' with the cheap suggestion that 'bad words break no bones, and wise people should ignore them.' It is instructive to observe how frequently, in ancient and modern codes of other countries, gross or constant abuse is made a cause for divorce. Let those who are inclined to

demur consider what their lives would be like if they had to submit to coarse and blasphemous abuse night after night in front of their children. I think the safeguard of temporary separation, with periodical applications to the Court during a period of two years, is a reasonable one, and would absolutely prevent hasty, frivolous or fictitious allegations being made an excuse for seeking divorce.

Neglect to maintain, which is another cause for separation, is also an elastic term. It may, and generally does, mean amongst the working classes neglect to provide sufficient for feeding the wife and children; but what misery may be caused by conduct which falls far short of that! In Germany the law compels a man to keep his wife and children according to his means and position; in England it is only necessary to keep them out of the

workhouse. The first is humane, and the second brutal. If a woman of the working classes is made to pay the rent, feed and clothe the husband and children out of an insufficient proportion of a man's wages, her life is a perpetual misery, and when it reaches the breaking-point, it seems most reasonable that, without actually leaving his house, as she is now compelled to do, she should be entitled to apply to the Court for a separation, which should last so long as the husband refused to comply with a reasonable demand, and might eventually be converted into a divorce. How many homes amongst those who are better off are made positively wretched by the husband compelling the wife to bear all the expenses of the home and the children, while he keeps for his own pleasures, whatever his tastes may happen to be, a handsome superfluity!

Somewhat analogous to an agreement to separate is collusion between parties to a divorce. There seems to be something ridiculous as well as painful in refusing to grant divorce to a worthy person simply because the other party has agreed not to defend the suit, and from public policy point of view there can be no good object in keeping two sinful persons together when they wish to part in such a way as to enable them to live honestly and morally with another companion, if that should be their desire. In Scotland divorce is not prevented by collusion or recrimination which establishes guilt in both parties; such a condition of things only affects the financial arrangements made by the decree. This appears to be most reasonable, because, in practice, nobody would seriously contend that the law ought to insist on cohabitation by persons who have broken the marriage tie and unequivocally desire to have it

dissolved. Divorce under such circumstances might reasonably be postponed for two years instead of the present term of six months.

The office of King's Proctor might, with great advantage, be abolished if collusion is not to be prohibitive and prolonged separations by consent, or by necessity, are allowed to be converted into divorce.

What, it will be said, is the practical difference between such facilities and 'divorce at the will of either party'? There is no use in denying that nothing can ever prevent people divorcing each other in fact if they are so minded, but it is reasonable to make such a step as serious and public as possible to ensure *bona fides;* and it is necessary to have the intervention of the Court to protect the interests of the family and prevent the innocent party from suffering more than is necessary, and the guilty party from obtaining any advantage without suffering for it.

The publication of proceedings is a matter for separate consideration, and should be under the complete control of the Court. At present it often punishes perfectly innocent people, and almost invariably does grave injury to the general public. I would have the decree compulsorily published and registered, and the distinction clearly marked between guilty and innocent parties, but I would leave to the discretion of the Court the nature and extent of the reports for the reading public. Half the misunderstanding about divorce is due to the disgust caused by the publication of offensive details which chain the imagination, so that it overlooks or ignores the suffering which has caused the proceedings to be taken. Further than this, the mischievous publication of immoral details in the lives of the more educated gives a wholly exaggerated impression of general immorality, and increases the disregard of

the marriage tie which is naturally engendered in the working classes by the refusal of the State to give them adequate relief.

I wish to make it abundantly clear that, while I sympathise most sincerely with those who wish to see divorces diminished in quantity, I consider that the only true and effective method is to concentrate the attack upon the causes rather than the results. These causes are to be found in marriages which have been undertaken without proper consideration for unworthy motives, such as money, or rank, or because of previous immorality, and much good may be done by greater strictness as to age and the consent of both parents, together with due regard for health and something in the nature of savings, or other means to justify so important a step.

The Church ought, as far as possible, to be dissociated from scandalous marriages;

and a considerable step towards this end would be taken by making it compulsory for all marriages to be first concluded before a registrar, leaving the religious service for those only who desire it, and who are considered to be in sufficient communion with the Church or other religious body to deserve it.

Marriage is a civil contract in every case, but it can only be a sacrament to those who believe it so. The suggested change would merely be reverting to the old practice before the Church insisted on making marriage an ecclesiastical matter, namely, a civil ceremony in the porch of a church, and a subsequent blessing inside the church.

If the Church service could be so changed as to be purged of moral ideas which are unsuited to an enlightened age, it would command the respect and retain the affection of the people; but it would still require protection from abuse of its privileges, which

leads to much scandal and loss of prestige for religion in general.

Protection of marriage is also to be sought in the change of law with regard to illegitimate children, and the curtailment of testamentary disposition. A man will be more careful of breaking the marriage ties if he is made equally responsible with the mother for illegitimate children, and if, whatever happens, he cannot deprive his lawful wife and children of a share of his property suitable to their condition and his means.

The courts in which divorce should be obtainable must be sufficient in number to be reasonably accessible to everybody, and the cost of proceedings must be small enough to make it possible for poor men or women to bear it. This should not be a negligible quantity, but sufficiently heavy to make anybody hesitate a considerable time before taking proceedings. It ought not to cost more

than £10 for persons whose income does not exceed £100, or £5 for those whose income does not exceed £50 a year. The Court should, as far as possible, be a special one for matrimonial causes, but if it must, for economic reasons, be associated with other matters, it would, I think, be very desirable that those matters should be criminal or quasi-criminal rather than civil. There should be something deterrent and disciplinary in the Court itself, and for this reason I think a county court would be less desirable than that of a recorder or stipendiary magistrate, or than the assizes.

My reason for thinking that a magisterial court would be the most suitable, is that the machinery of those courts has been for some time adapted to the reformation of persons who have fallen into the criminal ranks, and the whole scheme of release from the marriage bonds is based upon the idea of possible

reconciliation and reformation without permanently breaking the marriage tie, and, in any case, reformation under new conditions if the marriage is dissolved. For this purpose probation officers will be required, and the confidential and personal nature of magisterial proceedings is most suitable. Nothing could be worse than that matrimonial offences should be treated like breaches of ordinary civil contracts, or that the causes should escape careful and personal supervision, which no judge could possibly give who is daily dealing with other matters of a completely different nature.

Trial by jury in matrimonial causes is not desirable and should be permissive only; and to diminish the chances of injustice such juries should be composed equally of men and women.

If separations are granted for present causes, or for others which may be added to

them, I think each cause should be assigned to an officer of the Court, whose duty it should be to report upon the case from time to time, and cause the parties to appear before the Court once every three or six months, according to order, for a period of two years in the case of cruelty, desertion, repeated imprisonment and neglect to maintain, of five years in the case of separation by agreement, and of three years in the case of insanity or inebriety.

Separations of this temporary nature, with the possibility of divorce, may well be regarded as a substitute for the old ecclesiastical penances, and furnish a very necessary sanction for the mutual performance of marriage obligations by both husband and wife. Divorces, on the other hand, may be regarded as the only means of preventing lifelong misery to many innocent persons, and of maintaining as high a standard

of morality in marriage as is considered desirable for the unmarried.

The object of all changes must be the strengthening of marriage obligations for both husband and wife, and thereby increasing both the sanctity of marriage and the chances of human happiness for each individual. It cannot be too frequently insisted upon that proceedings for separation or divorce will always be voluntary acts, and that a large majority of mankind in all classes have no desire or necessity to seek release from the ties which they have formed. Liberty, equality, and fraternity are as necessary for human happiness in family life as they are in national life, governed by democratic ideas. To secure these blessings for both sexes in marriage, as well as in everything else, should be the aim of legislation. The progress of the world has been shown to be towards monogamy as

the ideal form of marriage; but to make it a reality men and women must be taught by the law to find security for their happiness in the maintenance after marriage of the same qualities and the same conduct as they relied upon to secure the union which they desired.

THE END

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